

# Whose Constitution?

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*in the beginning, all the World was America*<sup>1</sup>

The Constitution begins with "We the People." Where does it end? Throughout its two-hundred-year history, insiders have repeatedly argued that various outsiders were beyond its reach. The unsuccessful assertion of Fourth Amendment claims by lawyers defending General Noriega in the wake of the invasion of Panama was only a spectacular recent example of the exploration along the Constitution's borders.

Defining the domain of American constitutionalism not only probes its foundations and tests moral commitments, but may also generate major practical consequences for immigration policy, the conduct of foreign affairs, military action, and the participation of American citizens in an increasingly global society. Looking only to the 1980's, claims of constitutional protection have been raised by English women living near American overseas missile sites,<sup>2</sup> United States investors dispossessed by American-influenced takings for Salvadoran land reform<sup>3</sup> and for training Nicaraguan Contras,<sup>4</sup> and both American and foreign organizations tied by financial strings to restrictions on over-

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1. J. LOCKE, *The Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT 343 (P. Laslett ed. 1965).

2. *See Greenham Women Against Cruise Missiles v. Reagan*, 755 F.2d 34 (2d Cir. 1985).

3. *See Langenegger v. United States*, 5 Cl. Ct. 229 (1984).

4. *See Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984), *vacated and remanded as moot*, 471 U.S. 1113 (1985).

seas abortion counseling.<sup>5</sup> Similar issues arise routinely in transnational civil litigation and criminal prosecution, especially in this age of massive narcotics smuggling.

The domain of constitutionalism has always been contested, and it has grown as the nation has grown. Some scholars have suggested that its rising trajectory points to a universal conferral of constitutional identity.<sup>6</sup> The courts have not reached that goal yet, and some scholars argue that they never should.<sup>7</sup> The current debate primarily concerns the rights of persons harmed by United States government action abroad, especially aliens but also United States citizens, yet even the constitutional status of island territories like Puerto Rico remains unsettled.<sup>8</sup> Within the borders of the United States, every person is protected by the Constitution, and it has long been established that "person" includes aliens who are unlawfully present,<sup>9</sup> though recent dicta justify the fear that intensified concerns over both drugs and migrants penetrating the border may put pressure on that commitment.<sup>10</sup> Outside United States borders, the American Law Institute's latest *Restatement of Foreign Relations Law* was able to conclude only that the issue of aliens' rights had "not been authoritatively adjudicated," while suggesting that "at least some actions by the United States in respect of foreign nationals outside the country are also subject to constitutional limitations."<sup>11</sup>

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5. See *DKT Memorial Fund v. Agency for Int'l Dev.*, 887 F.2d 275 (D.C. Cir. 1989); *Planned Parenthood Fed'n of Am. v. Agency for Int'l Dev.*, 838 F.2d 649 (2d Cir. 1988).

6. See, e.g., Henkin, *The Constitution as Compact and as Conscience*, 27 WM. & MARY L. REV. 11 (1985); Lobel, *The Constitution Abroad*, 83 AM. J. INT'L L. 871 (1989); McCauliff, *The Reach of the Constitution: American Peace-time Court in West Berlin*, 55 NOTRE DAME L. REV. 682 (1980); Mansfield, *The Religion Clauses of the First Amendment and Foreign Relations*, 36 DE PAUL L. REV. 1 (1986); Paust, *Introduction to and Commentary on Terrorism and the Law*, 19 CONN. L. REV. 697, 721-35 (1987); Ragosta, *Aliens Abroad: Principles for the Application of Constitutional Limitations to Federal Action*, 17 N.Y.U. J. INT'L L. & POL'Y. 287 (1985); Saltzburg, *The Reach of the Bill of Rights Beyond the Terra Firma of the United States*, 20 VA. J. INT'L L. 741 (1980); Note, *The Extraterritorial Application of the Constitution—Unalienable Rights?*, 72 VA. L. REV. 649 (1986).

7. See, e.g., Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587, 644-45 (1949); Stephan, *Constitutional Limits on International Rendition of Criminal Suspects*, 20 VA. J. INT'L L. 777 (1980) [hereinafter *International Rendition*]; Stephan, *Constitutional Limits on the Struggle Against International Terrorism: Revisiting the Rights of Overseas Aliens*, 19 CONN. L. REV. 831 (1987) [hereinafter *Terrorism*]; Lowenfeld, Book Review, *Hijacking, Freedom, and the "American Way"*, 83 MICH. L. REV. 1000, 1009-11 (1985) (reviewing H. STERN, *JUDGMENT IN BERLIN* (1984)). And, from an alien point of view, see Forch, *Mitwirkung deutscher Geschworener an der Ausübung amerikanischer Besatzungsgerichtsbarkeit in Berlin*, 40 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 760 (1980).

8. See *Harris v. Rosario*, 446 U.S. 651, 653-54 (1980) (Marshall, J., dissenting); *United States v. Lopez Andino*, 831 F.2d 1164 (1st Cir. 1987); J. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* (1985).

9. See, e.g., *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987); *Plyler v. Doe*, 457 U.S. 202 (1982); *Wong Wing v. United States*, 163 U.S. 228 (1896).

10. See *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1064-65 (1990).

11. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 722 comment m (1987). Even this tentative statement found support in only a limited set of lower court opinions. See *id.* reporters' note 16.

From its inception, the very text of the Constitution has suggested inconsistent readings of its intended scope. The Preamble arguably speaks the language of social contract, perhaps even narrowing what follows by emphasizing that "We the People of the United States, in Order to . . . secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." On the other hand, the supremacy clause gives a different characterization of the document—"This Constitution . . . shall be the supreme Law of the Land"—and Article III appears to "establish Justice" for foreign citizens, subjects, and even ambassadors by designing tribunals that will decide their cases impartially. I shall explain later that social contract and law-of-the-land interpretations can be easily reconciled,<sup>12</sup> but the contrast illustrates the Constitution's susceptibility to diverse conceptualizations.

Chief Justice Rehnquist recently invoked a restrictive version of the social contract tradition in his Opinion of the Court in *United States v. Verdugo-Urquidez*.<sup>13</sup> The Court there held that the warrant clause of the Fourth Amendment had no application to American drug enforcement agents' search of the Mexican home of an alleged Mexican drug lord and brutal murderer who had been seized by Mexican police and delivered into custody in California.<sup>14</sup> Rehnquist argued that the defendant had no Fourth Amendment rights in his Mexican home because he was not one of "the people" to whom that amendment guaranteed rights.<sup>15</sup>

Rehnquist also cited "history and case law" as tending to show that nonresident aliens have no constitutional rights against agents of the United States acting outside its borders.<sup>16</sup> His discussion assumed that examples drawn from two centuries of American constitutional history could all be reconciled, and that the governing principles had not changed over this period. As I shall show here, that assumption is badly mistaken. The principles determining the Constitution's coverage have been sharply controverted during those two hundred years, and different approaches have been dominant at different times. The authors of the Bill of Rights almost certainly viewed *everyone's* constitutional rights as territorially restricted by the national boundaries; that view is utterly discredited today, and the question whether nonresident aliens' rights should continue to be so restricted cannot be answered by direct recourse to eighteenth-century practice.

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12. See *infra* text accompanying notes 57-63 (explaining fundamental law as element of social contract account).

13. 110 S. Ct. 1056 (1990).

14. *Id.* at 1059. Seven Justices in four opinions agreed on this proposition, counting Justice Blackmun, who nonetheless dissented. Justices Brennan and Marshall disagreed. See *infra* text accompanying notes 378-402.

15. 110 S. Ct. at 1060-61. Although it is denominated an opinion of the Court, only four Justices joined fully in its reasoning, and Justice Kennedy specifically disassociated himself from this text-based portion of the argument. *Id.* at 1066-67 (Kennedy, J., concurring).

16. *Id.* at 1065.

To understand the course that American constitutionalism has taken since 1789, it is necessary to consider not only the rules that have been adopted at various historical periods, but also the normative visions underlying those rules and the choices faced by the decisionmakers. In this Article I shall explore, in both historical and contemporary terms, the principles that could be utilized to determine the personal and geographical scope of constitutional rights. Distinctions of person and place raise questions regarding the function of constitutional rights, and the responses these questions have provoked must be examined in tandem.

Closer examination of American constitutional history reveals a prominent rival to the “members only” version of the social contract tradition. This is not, as some might expect, the notion of the Constitution as directly embodying universal natural law, which turns out to have played a minor role. Rather, it is the concept of the Constitution as a fundamental municipal law, taking its scope from its character as law and the nature of legal obligation. This “municipal law” tradition has weathered a series of shifts in jurisprudential background, and has survived independently of belief in natural rights. It has rendered irrelevant the observation that, even if natural rights exist, some American constitutional rights are not plausibly among them. I shall associate the municipal law tradition with, among others, James Madison, John Marshall, John C. Calhoun, Roger Taney, the first Justice Harlan, and Hugo Black. Justice Blackmun invoked municipal law arguments in his *Verdugo-Urquidez* dissent, and I shall defend this approach myself.

I shall also show how, in this century, the tradition emphasizing membership as a precondition for having constitutional rights at all was transformed into a more flexible, discretionary approach that might best be named “global due process.” Although this approach could be applied to aliens, history reveals that it has served as a doctrine of legal geography, not one of personal status. Its primary exponents, Chief Justice Edward White, Felix Frankfurter, and the second Justice Harlan, treated it as equally available against citizens. In rejecting the text of the Constitution as a basis for recognizing rights, this doctrine may even claim an unwelcome parentage in the eighteenth century: those Federalists who defended the Alien Act of 1798 by relegating aliens to their rights under international law. That infamous statute lies at the root of the historical debate over aliens’ rights in this country, and the controversy that it engendered deserves close attention.

This Article begins in Part I by briefly sketching some ways of thinking about a constitution’s scope as regards persons and places, including the models that have been most influential in American constitutional history. It then more fully explores the normative framework of social contract and natural law that initially set the terms of the debate.

Part II addresses the question of aliens’ rights within United States territory, beginning with the formative debate on the Alien Act, in which the Jeffersoni-

ans maintained the orthodox municipal law approach to aliens' rights, and then tracing the dominance of that approach through the nineteenth century into the twentieth. Part III turns to the question of the Constitution's geographical scope; Part III.A examines the recurrence of unsuccessful challenges to the municipal law approach's nineteenth-century insistence that constitutional rights necessarily followed the nation's expansion across the continent, while Part III.B discusses how a geographical membership approach triumphed at the turn of the century in order to promote colonialism, even at the expense of individual American citizens.

Part IV employs the understandings derived from this history to explain the abandonment of territorial restriction of the Constitution in the 1950's, and then rejoins the strands of alienage and geography in analyzing the *Verdugo-Urquidez* case. Finally, Part V argues that a modern version of the municipal law approach still represents the best account of the scope of American constitutionalism.

## I. FRAMING THE RIGHT QUESTIONS

To put the historical debates over the Constitution's reach in their proper context, I shall briefly sketch the current, incomplete state of the law and some basic models for addressing the questions they raise. It will later appear that all of these models can be regarded to some extent as workings out of a social contract theory of constitutionalism.<sup>17</sup> Social contract thinking played an important role both in the origins of the American Constitution and in the historical debates that this Article will address. Moreover, contractarian political theory has enjoyed a significant revival in this century. It will therefore be worthwhile to recall, in subpart B below, certain aspects of the social contract tradition as the authors of the Constitution received it in the eighteenth century.

I should also emphasize at the outset that the subject of inquiry in this Article is United States *constitutional* rights. An individual's constitutional rights do not always coincide with her subconstitutional statutory or common law rights available at a given time within the United States' domestic legal system, her human rights recognized under international treaties or customary international law, or her moral rights independent of any legal system.<sup>18</sup> In particular situations, someone who lacks a constitutional right may nonetheless be sufficiently protected by an enforceable nonconstitutional norm; even if no legal machinery for enforcement of a norm protects the individual, nonconstitutional norms may provide reasons why government *should* not engage in certain action. This Article does not make any claims about the proper scope of such

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17. This is most explicitly summarized for all four models in Part V below, but various points will be made earlier.

18. I do not intend the latter observation as a commitment to legal positivism, but rather as a denial that constitutional rights and moral rights can always be equated.

nonconstitutional protection, but assumes that constitutional law is one among a plurality of normative systems.

Moreover, I will not assume that United States constitutional rights must always be *judicially* enforceable. It can be meaningful to ask whether the legislature and the executive should consider themselves constitutionally prohibited from certain action, even where no judicial resolution of the question is possible.

### A. *Some Basic Models*

It may be well to remind the reader of some of the most important data points that the Supreme Court's current body of precedent supplies for builders of models. First, United States citizens within the borders of the states possess the full complement of constitutional rights—that is the core situation for which constitutional rights were created. Second, the Supreme Court has expressly held for over a century that aliens within the United States are also persons entitled to constitutional protection.<sup>19</sup> Moreover, the Court has held that aliens not present in the United States are entitled to constitutional protection with regard to actions taken within the United States against their property rights.<sup>20</sup>

The situation becomes more complicated with regard to government action outside the borders of the states. In the nineteenth century, the Supreme Court generally maintained that government action outside the borders of the *nation* was not constrained by constitutional rights.<sup>21</sup> In the notorious *Insular Cases*, the Supreme Court held that the Constitution does not even “follow the flag,” that is, the United States may acquire sovereignty of “unincorporated” possessions where it will be bound only by those provisions of the Constitution that the Court deems “fundamental;”<sup>22</sup> these cases have never been expressly overruled. However, in its 1957 decision in *Reid v. Covert*,<sup>23</sup> the Supreme Court held that, even in foreign countries, the requirements of trial by jury and indictment by grand jury must be afforded when United States authorities prosecute United States citizen civilians for capital crimes. Since *Reid v. Covert*, it has generally been recognized that the Constitution as such “applies” wherever the government of the United States may act, and provides the source of the federal government's authority to act there—the disputable question is whether

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19. *Wong Wing v. United States*, 163 U.S. 228 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). The Court had never suggested a contrary holding before that time. See *infra* text accompanying notes 166-79.

20. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931); see also *Sardino v. Federal Reserve Bank*, 361 F.2d 106, 111 (2d Cir. 1966) (Friendly, J.).

21. The classic holding is *In re Ross*, 140 U.S. 453 (1891) (no constitutional rights in trial of capital offense by American consul in Japan), discussed *infra* text accompanying notes 279-84.

22. It is important to emphasize that this goes for citizens as well as aliens under the *Insular Cases*.

23. 354 U.S. 1 (1957). The Court extended this holding to noncapital crimes in *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960).

a particular constitutional limitation on the government's authority to act should be regarded as including within its prohibitions unusual categories of places or persons. *Verdugo-Urquidez* now tells us that the Fourth Amendment's warrant clause places no restrictions on searches of nonresident aliens' property located in a foreign country.<sup>24</sup>

What understanding of constitutionalism would assist a court in deciding these problems? Four kinds of approaches have emerged in the course of American constitutional history, and indeed all four are represented in the various opinions written by the Justices in *Verdugo-Urquidez*:

### 1. *Universalism*

Universalist approaches require that constitutional provisions that create rights with no express limitations as to the persons or places covered should be interpreted as applicable to every person and at every place. The precise commands of the provisions, especially of those creating rights subject to balancing tests, may vary from place to place, but one can never simply dismiss the provisions as inapplicable. As we shall see, the universalist approach appears in portions of Justice Brennan's dissent in *Verdugo-Urquidez*,<sup>25</sup> but played almost no role in American constitutionalism until recent years.

The argument for universal application may rely upon the natural rights background of the American constitutional tradition, possibly reinforced by contemporary conceptions of human rights.<sup>26</sup> Or it may proceed simply by literalism, observing that some portions of the constitutional text limit their protections expressly to certain places or persons,<sup>27</sup> while others do not.<sup>28</sup>

Some have argued for universalism by replacing its natural law foundation with the argument that, because the Constitution is an "organic" act giving "life" to the federal government and providing its only powers, the federal government cannot exercise powers withheld by the Constitution anywhere, or with respect to any person.<sup>29</sup> This organic argument has force when offered in response to claims of inherent extra-constitutional power free of all constitutional restriction.<sup>30</sup> But when offered as a rule for determining the personal or geographical scope of constitutional restrictions, the argument frequently

24. 110 S. Ct. 1056 (1990).

25. See *infra* notes 397-99 and accompanying text.

26. See, e.g., Henkin, *supra* note 6.

27. See, e.g., U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . .") (emphasis added); *id.* art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); *id.* art. I, § 8, cl. 1 ("[A]ll Duties, Imposts and Excises shall be uniform throughout the United States . . ."); *id.* amends. XV, XIX, XXIV, and XXVI (citizens of the United States).

28. See, e.g., *id.* amend. V.

29. See, e.g., Saltzburg, *supra* note 6.

30. See Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946).



becomes circular.<sup>31</sup> Application of the organic principle presupposes an interpretation of the pertinent constitutional restriction; it does not in itself supply one.<sup>32</sup>

## 2. Membership Models

Social contract rhetoric has played a significant role in American constitutionalism. Social contract theory seeks to legitimate government through the idea of an actual or hypothetical agreement embodying the consent of the governed who have established the state and empowered it to govern. Some accounts of social contract theory identify a limited class of "members" as the proper beneficiaries of the contract. The beneficiaries have rights based in the contract; nonbeneficiaries are relegated to whatever rights they may have independent of the contract. A skeptic who did not ascribe normative force to social contract arguments still could invoke the idea of a social contract as a historically-grounded tool for interpreting American constitutionalism.<sup>33</sup> This sort of reasoning is evident in Chief Justice Rehnquist's opinion in *Verdugo-Urquidez*.<sup>34</sup>

If the restriction of constitutional rights to members is to be justified by characterizing the Constitution as a social contract, then it becomes necessary to identify the set of parties to the contract. As we shall see, advocates of restrictive membership approaches have argued for widely varying descriptions of the parties: they may include all the citizens of the nation "the United States," the subset consisting of those who are citizens of the various states, or some intermediate group including citizens of some, but not all, territories. During certain periods of American history, it has been claimed that the parties to the Constitution were not individual citizens, but rather the several states.<sup>35</sup> Moreover, even if individuals are parties to the Constitution, that document reserves sovereign political power to the people of the states alone,<sup>36</sup> and only they have given their consent to it at the time of each state's accession to the union. Accordingly, some supporters of a membership model have argued that

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31. For example, understanding the Constitution as an organic act establishing the federal government is wholly uninformative as to whether the freedom of speech and association protected by the First Amendment includes the political activity of Nicaraguans in Nicaragua, *cf.* *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985) (dismissing, *inter alia*, constitutional claims brought by Nicaraguan citizens against support of Contras), or even the political activity of Americans in Mexico, *cf.* *Perez v. Brownell*, 356 U.S. 44 (1958) (upholding involuntary expatriation of Mexican-American dual national who voted in Mexican election), *overruled*, *Afroyim v. Rusk*, 387 U.S. 253 (1967).

32. *See* Damrosch, *Foreign States and the Constitution*, 73 VA. L. REV. 483, 487 (1987) ("The proposition that the Constitution applies to all exercises of governmental power, even foreign relations, is only a starting point.") (footnote omitted). The discussion in this Article relates only to the rights of individual aliens, and not to the juristic persons discussed by Damrosch.

33. *See, e.g., International Rendition*, *supra* note 7.

34. *See infra* notes 378-88 and accompanying text.

35. *See infra* text accompanying notes 161-64, 228-30.

36. The Twenty-Third Amendment muddies this argument slightly. *See* U.S. CONST. amend. XXIII.

constitutional protections should be available within the geographical limits of the states (plus or minus the District of Columbia, which was formerly part of Maryland), but *not* in the territories.<sup>37</sup>

### 3. *Municipal Law, including Strict Territoriality*

Under a strictly territorial model, the Constitution constrains the United States government only when it acts within the borders of the United States. Strict territoriality prevailed as dogma for most of American constitutional history, until its overthrow in *Reid v. Covert*.<sup>38</sup> During that period, courts rarely saw any need to justify it. For nineteenth-century American law, this model operated as a reflection of the territorial sovereignty of the nation-state.<sup>39</sup> Chief Justice Marshall asserted as a basic principle, "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute."<sup>40</sup> Through the lens of conflict of laws, this way of thinking grew more rigid over the course of that century, from the comity approach of Joseph Story to the vested rights doctrine of Joseph Beale.<sup>41</sup> To a territorialist, a law is binding of its own force only within the territory of the nation-state that promulgates it. If the Constitution is viewed as itself a "law" or legal norm, then the territorialist would conclude that the Constitution has power to bind only within the nation's borders. Extending the Constitution over the entire territory then gives it the fullest possible effect that it can have of its own force.

Strict territoriality should be seen as a special case of a more general approach that focuses on a sphere in which American municipal law operates.<sup>42</sup> Rather than define that sphere solely in terms of geography, one may define it in terms of a broad range of factors. The Constitution, as fundamental municipal law—"the supreme Law of the Land"<sup>43</sup>—also operates within that sphere, and constrains the actions of government. When the government acts outside the sphere of municipal law, it enters a field where its actions do not impose obligations. There individuals are not bound by the United States

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37. This argument has serious problems, but it was quite important historically. See *infra* text accompanying notes 243-52, 305.

38. 354 U.S. 1 (1957). See *supra* text accompanying note 23.

39. This appears most clearly in *In re Ross*, 140 U.S. 453, 464-65 (1891) (Field, J.), as discussed *infra* text accompanying notes 279-83.

40. *Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 136 (1812).

41. See, e.g., *Slater v. Mexican Nat'l R.R.*, 194 U.S. 120 (1904) (Holmes, J.); 1 J. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 73 (1916); J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS 19-38 (1834); Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361 (1945).

42. I use the term "municipal law" in its meaning as a synonym for the domestic law of a given state, in opposition to international or natural law. My use of the term to describe a model of constitutionalism derives from the Jeffersonians' use of the term in the debates on the Alien Act. See *infra* notes 143-53 and accompanying text.

43. U.S. CONST. art. VI, § 2.

government, nor does the Constitution bind the government to respect what would otherwise be the individuals' constitutional rights.

As I shall demonstrate, strict territoriality and broader municipal law models can be derived from a social contract understanding of constitutionalism, in which a constitution may take on the character of both law and contract. These models differ from membership models in their explanation of how one becomes a beneficiary of a social contract. They find rights to be prerequisites for justifying political or legal obligation—or, in other words, sovereignty. Justice Brennan has recently described the municipal law approach as one of “mutuality.”<sup>44</sup> This linkage of obligations and rights does not necessarily guarantee the full package of constitutional rights, however—just as the universalist model concedes that a proper reading of the constitutional text may limit certain rights to citizens or domestic territory, so municipal law approaches recognize that certain rights may have been reserved to particular categories of persons or places.

To apply a municipal law model, one must specify the sphere of municipal law. The nineteenth century equated this sphere with the territory of the United States, but over time, expanded concepts of United States lawmaking power have led to an expansion in the reach of the municipal law approach. The modern form of this approach presumes the applicability of constitutional rights in three contexts: (i) within United States territory, to all persons, (ii) to citizens of the United States everywhere in the world, and (iii) to aliens outside United States territory *only* in those circumstances in which the United States seeks to impose obligations upon them under United States law.<sup>45</sup> An approach of this kind may be seen in Justice Blackmun's brief dissenting opinion in *Verdugo-Urquidez*,<sup>46</sup> and at the conclusion of this Article, I shall argue that it represents the best account of American constitutionalism.

#### 4. *Balancing Approaches, or “Global Due Process”*

Extending to an individual abroad the full complement of constitutional rights that she would enjoy within United States territory may seem too generous a compensation for subjecting the individual to only some of our laws. If one views a constitution as a contract designed to create a balance of power between the governors and the governable, then the government's reduced right to obedience and reduced means of enforcement may call for a reciprocal reduction in individual rights. Universalism is often criticized for the danger

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44. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1071 (1990).

45. See also *infra* Part V. One might say that aliens outside the United States enjoy constitutional rights *pro hac vice* in circumstances where the United States seeks to impose legal obligations upon them; this transactional metaphor should not, however, be misunderstood as limiting the availability of rights to “cases” before courts or other formal tribunals.

46. See *infra* notes 400-02 and accompanying text.

that would be posed to the United States if it unilaterally renounced powers that other nations freely exercise.<sup>47</sup>

This emphasis on the countervailing necessities of overseas action may suggest that all of these models can be collapsed into a brand of harmless universalism: recognize constitutional rights as potentially applicable worldwide, and then balance them away. One might engage in ad hoc balancing in the individual case, or balance more categorically; the balancing process may be intrusive or highly deferential. The concurrences of Justices Frankfurter and Harlan in *Reid v. Covert* offer an example of this approach as regards citizens' rights abroad,<sup>48</sup> and Justice Kennedy in *Verdugo-Urquidez* located himself within the tradition of Harlan's concurring opinion.<sup>49</sup> This approach suggests that, ultimately, extraterritorial constitutional rights boil down to a single right: the right to "global due process."

### B. *Vattel and the Eighteenth-Century Normative Framework*

The linked traditions of social contract theory and naturalist international law played an important role in both the creation of the United States Constitution and the early debates over its applicability to noncitizens and to government action outside the states.<sup>50</sup> One representative of both traditions, Emmerich de Vattel's *Law of Nations*, requires particular notice because of its great prestige in post-Revolutionary America, also reflected in these debates.<sup>51</sup> Since these debates framed the issues for future reconsideration, it is essential to give closer attention to these traditions if we wish to understand the ideas that the debaters were invoking, as well as to gain insight into what a serious commitment to a social contract view of constitutional rights might entail. I

47. See, e.g., Fairman, *supra* note 7; *Terrorism*, *supra* note 7.

48. See *infra* text accompanying notes 358-63.

49. See *infra* text accompanying note 392.

50. See, e.g., G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-87*, at 273-91 (1969); *infra* text accompanying notes 103-54, 196-202, 236-51.

51. 3 E. DE VATTEL, *THE LAW OF NATIONS OR PRINCIPLES OF NATURAL LAW* (1916) (C. Fenwick trans. ed. 1758); on Vattel's prestige, see, e.g., J. BRIERLY, *LAW OF NATIONS* 37-40 (6th ed. 1963); 1 J. KENT, *COMMENTARIES ON AMERICAN LAW* \*18; F. RUDDY, *INTERNATIONAL LAW IN THE ENLIGHTENMENT* 281-310 (1975). But see *Brown v. United States*, 12 U.S. (8 Cranch) 110, 140-41 (1814) (Story, J., dissenting).

Conversely Rousseau, who stood outside the natural rights tradition, will receive less attention here than his place in the history of political philosophy might suggest, for three principal reasons. First, for a Swiss living in France, he had little to say on the subject of aliens and their rights. See J. ROUSSEAU, *DISCOURSE ON THE ORIGIN AND FOUNDATIONS OF INEQUALITY AMONG MEN*, reprinted in *THE FIRST AND SECOND DISCOURSES* 77, 160-61 (R. & J. Masters trans. ed. 1964); J. ROUSSEAU, *THE SOCIAL CONTRACT*, reprinted in *POLITICAL WRITINGS* 117, 155 (F. Watkins trans. ed. 1986) [hereinafter J. ROUSSEAU, *THE SOCIAL CONTRACT*]; J. ROUSSEAU, *THE CONFESSIONS* 377-78, 394-95 (J. Cohen trans. ed. 1953). Second, the distinctive features of Rousseau's political thought appear not to have been influential in 18th-century America and his reputation there suffered as a result of the French Revolution. See P. SPURLIN, *ROUSSEAU IN AMERICA 1760-1809*, at 63-70, 101-13 (1969). Third, the crucial debate occurred in the United States at the time of the Alien and Sedition Acts, which embodied a reaction against the French Revolution, so that neither side had any incentive to invoke Rousseau. See *infra* text accompanying note 96.

shall show that the traditions contained serious ambiguities concerning the personal and geographical scope of a social contract, ambiguities that provided alternative orientations for American constitutionalism.

The central problem that the social contract tradition sought to address was the legitimacy of government—how the duty of subjects or citizens to obey laws could arise, and what limits there might be, the transgression of which would release them from obedience. The theory has ancient roots, but one medieval form particularly deserves mention here: the idea of a contract of government, articulated in an oath or charter at the time of accession, between the monarch and the people.<sup>52</sup> This description, however, presupposes the people as a unity capable of making an agreement that binds its members. Later thinkers explored the relationship between individuals and society that could support such a binding agreement.

The social contract analysis was motivated by the view that an individual obligation to obey must be grounded in individual consent, either actual or justly presumed. The authors imagined individuals in a “state of nature,” without the protections of a common earthly authority. Whether solely from a desire for greater security, for cooperation toward material improvement, or out of an inherent sociability, they came together and agreed to form a polity.<sup>53</sup> This collective agreement may be called the social contract proper, in contrast to the contract of government between the ruler and the ruled.

The number and content of the agreements varied from author to author. These variations were crucial because they determined who was bound and to what. Hobbes, for example, eliminated the contract of government. In his vision, competitive, self-interested individuals, rationally seeking escape from the universal warfare that characterized his state of nature, agreed to join together and to submit to whatever particular individual or group the majority would select as an absolute sovereign. No contractual limitations or conditions on sovereignty existed, and the sovereign could not be accused of breach, although sovereign failings might lead to the commonwealth’s dissolution through external conquest or other social breakdown.<sup>54</sup>

Most later writers in the social contract tradition sought to restore the limitations on the sovereign. Pufendorf included both the social contract proper and the contract of government in a multi-stage description of the origin of the state.<sup>55</sup> For Pufendorf, the power of government was limited by the explicit terms of the agreements, the ends for which government was instituted, and the

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52. J. GOUGH, *THE SOCIAL CONTRACT* 27-35 (2d ed. 1956).

53. For most writers, the contract extended itself to descendants of the original members by means of tacit consent deduced from their acceptance of its benefits. *See, e.g.*, 2 J. BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW* 30-31 (E. Nugent trans. 1823); J. LOCKE, *supra* note 1, at 390-94; 3 E. DE VATTTEL, *supra* note 51, at 88-89. *But see* T. HOBBS, *LEVIATHAN* 255 (C.B. MacPherson ed. 1985).

54. T. HOBBS, *supra* note 53, at 272, 375-76.

55. 2 S. PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* 974-75 (Oldfather & Oldfather trans. 1934) (2d ed. 1688).

laws of nature.<sup>56</sup> Locke followed Pufendorf in subjecting government power to natural law but, for reasons of his own, replaced the contract of government by a "fundamental positive Law" establishing the government.<sup>57</sup> The powers of government were held in trust, and breach of this trust justified the people in resuming their natural liberty.<sup>58</sup> The trust analogy "fitted Locke's intention admirably, for unlike the contract of government, in which rights and duties were reciprocal, it left the duties on the side of the government, and the rights on the side of the people."<sup>59</sup>

The idea of a "fundamental law" establishing the form of government held greater prominence in later writings, including Vattel's *Law of Nations*.<sup>60</sup> Vattel was a disciple of Christian Wolff, who agreed with Pufendorf in viewing humans as naturally sociable.<sup>61</sup> Vattel explained the creation of the state as the product of an act of association, or social contract,<sup>62</sup> followed by a fundamental regulation or constitution, which set forth "the organization by means of which the Nation acts as a political body; how and by whom the people are to be governed, and what are the rights and duties of those who govern."<sup>63</sup>

The notion of a written and binding fundamental law, of course, became the great vehicle for American constitutionalism.<sup>64</sup> Because the notion had previously existed more in theory than in practice, the authors did not fully anticipate the questions that would arise in its implementation. Two points on which they were susceptible to opposing interpretations were the rights of aliens under the fundamental law and the extension of the fundamental law to newly acquired territory.

56. *E.g.*, *id.* at 1068-72, 1077-78.

57. J. LOCKE, *supra* note 1, at 401-02.

58. *Id.* at 460-64, 476-77.

59. J. GOUGH, *supra* note 52, at 143.

60. 3 E. DE VATTEL, *supra* note 51; *see also* 2 J. BURLAMAQUI, *supra* note 53, at 26-27, 45-46; J. ROUSSEAU, *THE SOCIAL CONTRACT*, *supra* note 51, at 57, 108-09. Rutherford defined a "civil constitution" as a contract between the people and their government, but noted that it could be called a law. T. RUTHERFORTH, *INSTITUTES OF NATURAL LAW; BEING THE SUBSTANCE OF A COURSE OF LECTURES ON GROTIUS DE JURE BELLI ET PACIS*, READ IN ST. JOHN'S COLLEGE, CAMBRIDGE 291-93 (1832 ed.) (first published 1754-1756). Edward Dumbauld notes Marshall's reliance on Rutherford. Dumbauld, *John Marshall and the Law of Nations*, 104 U. PA. L. REV. 38, 40 (1955).

61. 3 E. DE VATTEL, *supra* note 51, at 5, 114; *see* 2 C. WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM*, 12-13 (J. Drake trans. 1934). On Vattel's relationship to Wolff, *see*, e.g., 3 E. DE VATTEL, *supra* note 51, at 6a-9a; F. RUDDY, *supra* note 51.

62. 3 E. DE VATTEL, *supra* note 51, at 13-14.

63. *Id.* at 17. However, in discussing the Lockean right of revolution, Vattel slips back into the locution that a prince's attack on the constitution of the state "breaks the contract which bound the people to him." *Id.* at 23.

64. *See* Stourzh, *Constitution: Changing Meanings of the Term From the Early Seventeenth to the Late Eighteenth Century*, in *CONCEPTUAL CHANGE AND THE CONSTITUTION* 45-48 (T. Bell & J. Pocock eds. 1988) (emphasizing Vattel's role in this process).

### 1. *Aliens and the Social Contract*

The social contract analysis places primary emphasis on the relationship between a state and its subjects or citizens. What then does it tell us about the rights of aliens? By definition, aliens began as outsiders to a particular social contract; they were either isolated individuals or members of another polity. The members of a given society remained in a state of nature as to outsiders. The consequences depended on one's understanding of a state of nature.

For Hobbes, continuing in the state of nature left outsiders in the condition of war. Thereafter, any outsider who sought to enter the country must submit to the sovereign and become a subject, unless the outsider or his own sovereign had managed to gain a contrary promise from the local sovereign.<sup>65</sup> In the latter case, the outsider's security rode on the terms of the promise, for "the Infliction of what evill soever, on an Innocent man, that is not a Subject, if it be for the benefit of the Common-wealth, and without violation of any former Covenant, is no breach of the Law of Nature."<sup>66</sup>

The notion of an alien's entering the country requires a shift of attention from the society as a union of individuals to the occupation of territory by a society. For Hobbes, the territory of a commonwealth simply consisted of those places where the commonwealth succeeded in exercising power. No property rights existed in a state of nature, and property was distributed by the sovereign after the institution of government.<sup>67</sup> Hobbes had no scruples about conquest,<sup>68</sup> so the territory could be consolidated into the sort of country an alien might think of entering. But those who ascribed a fuller set of duties to the Law of Nature, identifying a natural right in the possessor of the soil, should have had more difficulty explaining why nations do not interpenetrate one another, like the weave of a cloth, or a checkerboard, or at least like "a slice of Swiss cheese."<sup>69</sup> Instead, they simply assumed a domain or a country voluntarily assembled.<sup>70</sup>

The assumption of a non-Hobbesian universal natural law also made an alien's life less cheap. A sovereign sometimes had a natural obligation to permit aliens to enter the territory, particularly when the alien's need was great or the

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65. T. HOBBS, *supra* note 53, at 273. Becoming a subject in a Hobbesian commonwealth, of course, does not guarantee much in the way of rights.

66. *Id.* at 360. We shall find a brand of neo-Hobbesism in Chief Justice Rehnquist's opinion in *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056 (1990). See *infra* text accompanying notes 378-81.

67. T. HOBBS, *supra* note 53, at 189-90, 234, 295-97.

68. *Id.* at 251-53, 255-57, 360.

69. R. NOZICK, *ANARCHY, STATE AND UTOPIA* 54-55 (1974); see also Brilmayer, *Consent, Contract and Territory*, 74 MINN. L. REV. 1, 10-17 (1989).

70. See, e.g., J. ROUSSEAU, *THE SOCIAL CONTRACT*, *supra* note 51, at 21-22; T. RUTHERFORTH, *supra* note 60, at 496; 3 E. DE VATTTEL, *supra* note 51, at 84; 2 C. WOLFF, *supra* note 61, at 50-51, 140. But see R. NOZICK, *supra* note 69.

entrance could be permitted without significant disadvantage.<sup>71</sup> The natural law school also limited the conditions the sovereign could justly attach to an alien's entrance.<sup>72</sup> They agreed that a sovereign had the right to insist on the alien's subjection to its laws as a condition for permission to enter the territory.<sup>73</sup> Thus, entrance by an alien entailed tacit consent to the laws, restoring the consensual basis of obligation. This led some to the semantic question whether the alien became a subject, or a temporary subject, or even a temporary citizen, though it was clear that an alien's admission and submission to the laws did not empower the alien as a full member of the body politic.<sup>74</sup>

The strength of natural obligations, however, should not be overestimated. For Vattel, as for Wolff, most natural obligations bound only "internally," in the sovereign's conscience, and were not "perfect" obligations. That is, they had not been recognized by the nations as rules whose violation justifies use of force.<sup>75</sup> Except in cases of absolute "necessity,"<sup>76</sup> Vattel and Wolff regarded the sovereign's obligation to admit aliens as internal and imperfect. The sovereign had the "external" right to decide for itself whom its interests enabled it to admit, and under what conditions.<sup>77</sup>

What does it mean to say that an alien is subject to "the laws?" That became the crucial question in the debates on aliens' rights.<sup>78</sup> Wolff and his disciple Vattel discussed at length the character of the laws to which aliens must submit, but they were ultimately unenlightening. Vattel maintained that "[b]eing thus subject to the laws, foreigners who violate them should be

71. See, e.g., 2 S. PUFENDORF, *supra* note 55, at 363-66; T. RUTHERFORTH, *supra* note 60, at 489; 3 E. DE VATTEL, *supra* note 51, at 92, 154; 2 C. WOLFF, *supra* note 61, at 80-81, 176-78; Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804, 810-15 (1983).

72. 2 S. PUFENDORF, *supra* note 55, at 354-55; 3 E. DE VATTEL, *supra* note 51, at 144; 2 C. WOLFF, *supra* note 61, at 150-51.

73. 2 J. BURLAMAQUI, *supra* note 53, at 31; 2 S. PUFENDORF, *supra* note 55, at 994; T. RUTHERFORTH, *supra* note 60, at 265; 3 E. DE VATTEL, *supra* note 51, at 144; 2 C. WOLFF, *supra* note 61, at 151-52; see also J. LOCKE, *supra* note 1, at 392.

74. See 2 J. BURLAMAQUI, *supra* note 53, at 31; J. LOCKE, *supra* note 1, at 394; 2 S. PUFENDORF, *supra* note 55, at 995; 3 E. DE VATTEL, *supra* note 51, at 87, 146; 2 C. WOLFF, *supra* note 61, at 152-53. At common law, aliens within the realm were regarded as local, temporary subjects. See *Calvin's Case*, 7 Coke Rep. 1a, 6a (1608); 1 W. BLACKSTONE, COMMENTARIES \*359; Blackstone even listed them as one of the divisions of the people. *Id.* at \*354.

75. 3 E. DE VATTEL, *supra* note 51, at 7; cf. 2 C. WOLFF, *supra* note 61, at 10-11, 19, 84-86 (distinguishing between positive law of nations and natural law, which confers only imperfect rights). *Contra*, 2 S. PUFENDORF, *supra* note 55, at 221-29 (fully equating law of nations with theologically grounded natural law). Vattel also described an intermediate category of obligations that were external, but imperfect; that is, they were created as positive international law, but they included an element of discretion that made it inappropriate to compel compliance. 3 E. DE VATTEL, *supra* note 51, at 7. Purely internal obligations were always imperfect.

76. 3 E. DE VATTEL, *supra* note 51, at 149-51; 2 C. WOLFF, *supra* note 61, at 174.

77. E.g., 3 E. DE VATTEL, *supra* note 51, at 92, 154; 2 C. WOLFF, *supra* note 61, at 81; accord, T. RUTHERFORTH, *supra* note 60, at 489. The distinction between the sovereign's external right to exclude, and its unenforceable natural obligation to admit, made Vattel's work ammunition for both sides in debates over immigration and its consequences. See *infra* text accompanying notes 105-08, 143, 150-53, 155-56; see also Nafziger, *supra* note 71, at 812 (discussing this susceptibility of Vattel).

78. See *infra* text accompanying notes 102-58.



punished accordingly,”<sup>79</sup> and that the sovereign “agrees to protect them as his own subjects.”<sup>80</sup> These were only natural obligations, but the foreign state was entitled to intervene

in cases where justice has been denied or the decision is clearly and palpably unjust, or the proper procedure has not been observed, or finally, in cases where his subjects, or foreigners in general, have been discriminated against.<sup>81</sup>

Nonetheless, Vattel stated that resident aliens “have only certain privileges which the law, or custom, gives them,”<sup>82</sup> and Wolff explicitly mentioned the sovereign’s right to “pass laws which hold foreigners alone.”<sup>83</sup> Vattel excepted them from certain laws that were “operative only in the case of citizens or subjects.”<sup>84</sup> Vattel and Wolff criticized as unjust the confiscation of aliens’ moveable property on their death, but neither saw cause for complaint in uniform laws denying aliens the right to possess immoveable property or to marry local women.<sup>85</sup>

Thus, the natural law tradition supported the notion that the externally binding law of nations required at least some minimal level of justice to aliens.<sup>86</sup> At the same time, it suggested that many legal discriminations against aliens were consistent not only with externally binding law, but also with internally binding natural obligations. Not even Wolff, who labelled them “temporary citizens,” thought aliens were naturally entitled to national treatment in all things. The tradition provided no unambiguous criteria for deciding which discriminations were permissible, either internally or externally. Vattel and Wolff said nothing about whether fundamental laws were included among those to which aliens were entitled.

## 2. *Territorial Expansion and the Social Contract*

Vattel and the naturalist school of international law discussed not only aliens who entered a sovereign’s territory, but also the extension of sovereignty over new territory. The naturalists generally argued that acquisition of inhabited

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79. 3 E. DE VATTEL, *supra* note 51, at 145.

80. *Id.*

81. *Id.* at 139.

82. *Id.* at 87.

83. 2 C. WOLFF, *supra* note 61, at 152; *see also id.* at 153 (“they are bound only to do and not to do the things which must be done or not done by citizens at the time under the same circumstances, except in so far as particular laws introduce something else concerning foreigners”).

84. 3 E. DE VATTEL, *supra* note 51, at 144; *see also id.* at 146.

85. *Id.* at 146-48; 2 C. WOLFF *supra* note 61, at 166-73; *see also* 2 S. PUFENDORF, *supra* note 55, at 371-72 (on restriction of intermarriage).

86. In later development, this becomes the contention for an “international minimum standard of justice,” as opposed to merely requiring “national treatment.” *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 711, 712 (1987).

territory must be founded in consent. European practice led them to recognize a category of "patrimonial" monarchy subject to the monarch's disposition, but the naturalists sought to limit this doctrine.<sup>87</sup> The social contract was a bond of unity, and a nonpatrimonial state could not alienate a portion of its members without their consent, at least not without compelling necessity.<sup>88</sup> Some of the naturalists, however, presumed the tacit consent of those defeated in a just war to the government of the conqueror.<sup>89</sup>

The naturalists did not contend that a state must extend its own fundamental laws over new territory. They assumed that natural rights should be respected in any constitution, but there were many different ways of achieving this. Several of them, including Vattel, wrote approvingly of a conqueror in a just war who rules the conquered territory under its prior form of government.<sup>90</sup> They did not view monarchy as necessarily inconsistent with natural law,<sup>91</sup> nor rule of one territory by another, so long as it was grounded in original consent.<sup>92</sup> On the other hand, Vattel briefly observed that when the political laws of a nation do not draw express distinctions, they also extend to its colonies.<sup>93</sup>

Thus, as in the case of aliens, the lessons of the natural law school for the scope of the Constitution were equivocal: The sovereign should conform to positive fundamental laws in all of its territory. But Vattel and the other naturalists did not require that the fundamental laws of a state be uniform throughout its territory, and they did not discuss which departures from uniformity were appropriate. Presumably, a sovereign whose fundamental law placed restrictions on the conditions of acquisition was bound by those restrictions, but their content was a local and not a universal question. Some basis for universal principles, however, may be seen in the requirement that any fundamental laws adopted must respect natural rights, and in the alternative means of legitimation provided by giving the acquired territory the fundamental laws that its own population prefers. It should be noted for future reference that nothing in this tradition makes the convenience of the acquiring power a

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87. 2 J. BURLAMAQUI, *supra* note 53, at 50-51; 2 S. PUFENDORF, *supra* note 55, at 1274-75; T. RUTHERFORTH, *supra* note 60, at 569-72; 3 E. DE VATTEL, *supra* note 51, at 33-34; cf. 2 C. WOLFF, *supra* note 61, at 447-48 ("in a doubtful case it may not be assumed that the kingdom is patrimonial").

88. 2 J. BURLAMAQUI, *supra* note 53, at 152-54; 2 S. PUFENDORF, *supra* note 55, at 1288-90; T. RUTHERFORTH, *supra* note 60, at 569; 3 E. DE VATTEL, *supra* note 51, at 14, 100-01; 2 C. WOLFF, *supra* note 61, at 510-11.

89. 2 J. BURLAMAQUI, *supra* note 53, at 211-12; T. RUTHERFORTH, *supra* note 60, at 594; 2 C. WOLFF, *supra* note 61, at 444-46.

90. 2 J. BURLAMAQUI, *supra* note 53, at 214; 3 E. DE VATTEL, *supra* note 51, at 309-12; cf. 2 C. WOLFF, *supra* note 61, at 446-48 (victor acquires absolute sovereignty over vanquished, not limited by laws of either, unless surrender is conditional).

91. 2 J. BURLAMAQUI, *supra* note 53, at 70-71; 2 S. PUFENDORF, *supra* note 55, at 1032-33; T. RUTHERFORTH, *supra* note 60, at 299-316; 3 E. DE VATTEL, *supra* note 55, at 20-21.

92. 2 J. BURLAMAQUI, *supra* note 53, at 212-15; 3 E. DE VATTEL, *supra* note 51, at 80-81; 2 C. WOLFF, *supra* note 61, at 47.

93. 3 E. DE VATTEL, *supra* note 51, at 86, cited in Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 225 (1845).

sufficient justification for the content of fundamental laws imposed on the new territory.

## II. RESPECTING PERSONS

The ambiguities of the social contract tradition regarding aliens' rights were not resolved in the drafting of the United States Constitution. Unlike their contemporaries in France, who produced a Declaration of the Rights of Man and of the Citizen, the drafters of the federal Bill of Rights did not take care to distinguish between the respective rights of citizens and persons. James Madison and his political allies were forced to address this postponed issue only a decade later, in response to the Alien and Sedition Acts of 1798.<sup>94</sup> The resulting debate over aliens' rights was the first of the major confrontations over the scope of American constitutionalism.

This Part will begin with an examination of the debate itself,<sup>95</sup> paying close attention to the political theory lying behind the claims of the debaters. Then it will show how the Madisonian position on the right-bearing capacity of aliens, which was the mainstream position of his time, was later confirmed in the judicial exposition of American constitutional law.

### A. *The Alien Act Debates*

The notion of restricting the Constitution's reach to citizens was vigorously debated in the polemics over the constitutionality of the Alien and Sedition Acts. These statutes embodied the extreme Federalists' reaction to the importation of dangerous revolutionary ideas from France, which they saw being spread by French agents, Irish immigrants, and Jeffersonian Republicans. The Alien Act of 1798 posed in stark form the question whether aliens had constitutional rights, since it subjected them to expulsion on mere suspicion through orders issued *ex parte* by the President.<sup>96</sup> The importance of this controversy as a test

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94. See generally D. MALONE, *JEFFERSON AND THE ORDEAL OF LIBERTY* 380-424 (1962); J. MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS* (1951); J. SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* (1956). There were eventually four relevant statutes. The Alien Enemies Act, ch. 66, 1 Stat. 577 (1798), applies only in time of war; it is still in force. 50 U.S.C. §§ 21-23 (1982). The Naturalization Act, ch. 54, 1 Stat. 566 (1798), extended the period of residence required before naturalization to fourteen years; it reflected the tendency of immigrants in the 1790's to become Jeffersonian Republicans, see J. SMITH, *supra*, at 23-25, and was repealed by the Act of Apr. 14, 1802, ch. 28, 2 Stat. 153. The Sedition Act, ch. 74, 1 Stat. 596, and the Alien Act (or Alien Friends Act), ch. 58, 1 Stat. 570 (1798), were by their terms temporary and expired on March 3, 1801, and June 25, 1800, respectively.

95. Detailed examination here is necessitated by the fact that historians of the period have devoted primary attention to the Sedition Act.

96. The Alien Act authorized the President "at any time during the continuance of this act, to order all such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States, within such time as shall be expressed in such order . . . ." Alien Act, ch. 58, 1 Stat. 570 (1798).

of principle, however, was magnified by its incorporation into Jefferson's political strategy, and by the subsequent prestige of the Jeffersonian defense of individual and states' rights.

The Jeffersonian Republicans viewed the passage of the Alien and Sedition Acts as an effort to destroy their party. Nonetheless, the Acts also offered an opportunity: although they would be used to punish criticism of the administration, public revulsion against them could prove to be a springboard to electoral victory. The Alien Act served as a useful exemplar of Federalist tyranny, and it continued to play a substantial role in Republican publicity. It allegedly exceeded the delegated powers of Congress, violated the separation of powers, and transgressed the explicit constitutional rights to trial by jury and due process of law.

The right-bearing capacity of aliens was, of course, not the sole or even the major focus of the struggle—the Sedition Act and the developing concept of states' rights took center stage. But, in systematically attacking or defending all portions of the Alien-and-Sedition package, this contentious generation laid the foundation for future thought on the place of aliens in American constitutionalism. These arguments were refined in three stages: during the original opposition to the bill, during the passage of the Virginia and Kentucky Resolutions protesting against the Acts, and in James Madison's 1800 Report for the Virginia legislature in defense of the Resolutions.

The Virginia and Kentucky Resolutions were Jefferson's great vehicles for denunciation of the Alien and Sedition Acts. Concealing their own participation, he and Madison enlisted the aid of local allies to shepherd resolutions through the state legislatures, asserting the unconstitutionality of the statutes and the urgency of taking measures against them.<sup>97</sup> These resolutions expounded the Constitution as a compact among the states. The rights of the states as parties included the right to identify violations of the compact by the federal government. Accordingly, the resolutions declared the unconstitutionality of the Alien and Sedition Acts.

The Virginia and Kentucky Resolutions evoked critical counter-resolutions from a majority of the other states.<sup>98</sup> The Federalists had some success in shifting the focus from the merits of the Alien and Sedition Acts to the disunionist tendencies of the Resolutions. They also continued to excite public fear of sanguinary French agents.

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97. See R. BEEMAN, *THE OLD DOMINION AND THE NEW NATION, 1788-1801*, at 186-88 (1972); Koch & Ammon, *The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties*, 5 WM. & MARY Q. (3d Series) 145 (1948).

98. D. MALONE, *supra* note 94, at 413; Anderson, *Contemporary Opinion of the Virginia and Kentucky Resolutions* (Parts 1 & 2), 5 AM. HIST. REV. 45, 225 (1899-1900). The Kentucky legislature renewed its protest in a Resolution of 1799, but did not repeat or refine its analysis of the defects of the Alien Act at that time. Resolution of Nov. 22, 1799, reprinted in 4 DEBATES, RESOLUTIONS AND OTHER PROCEEDINGS, IN CONVENTION, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 544 (J. Elliot 2d ed. 1836) [hereinafter ELLIOT'S DEBATES].

The Virginian Republicans prevailed upon Madison to enter the Virginia House of Delegates in order to lend his prestige openly to this struggle.<sup>99</sup> Madison then drafted a Report, which the legislature adopted in January, 1800, restating the case for the Virginia Resolutions. In later years, this Report was extravagantly praised as a summation of Jeffersonian doctrine and the “principles of ‘98.”<sup>100</sup> Reprinted at various dates, and incorporated verbatim in Elliot’s Debates,<sup>101</sup> it kept accessible for further use (or distortion) a fuller account of those principles than the Resolutions themselves.

### 1. *Federalists and the Membership Approach*

The existing reports of the debates in the House of Representatives on the passage of the Alien Act show that the major themes had already emerged.<sup>102</sup> Albert Gallatin, the foreign-born leader of the Jeffersonian forces in the House, argued that the generality of the Constitution’s language, particularly its references to “persons” rather than “citizens,” made its protection available to aliens.<sup>103</sup> The Federalists not only countered these arguments clause by clause, but also made a more fundamental response: aliens were not parties to the Constitution; it was not made for their benefit; and they had no rights under it. Harrison Gray Otis, for example, sneeringly noted “that ‘we, the people of the United States,’ were the only parties concerned in making that instrument. He found nothing in it which bound us to fraternize with the whole world.”<sup>104</sup>

The Federalists thus gave a nativist twist to the social contract background of American constitutionalism. Citizens, as parties to the contract, could assert constitutional rights. But aliens were not parties and had to look elsewhere for their rights—for example, to the law of nations, which recognized the power of a nation to expel aliens at will.

In the debates on the Virginia Resolutions, the Federalists in the House of Delegates made fundamental arguments as well as clause-specific ones. They reiterated that aliens were not “parties” to the Constitution, and therefore had

99. R. BEEMAN, *supra* note 97, at 210; Koch & Ammon, *supra* note 97, at 163-64.

100. See Fong Yue Ting v. United States, 149 U.S. 698, 747-48 (1893) (Field, J., dissenting); Hunter v. Martin, 18 Va. 1, 29 (1814) (Roane, J.); South Carolina Exposition, reprinted in 10 THE PAPERS OF JOHN C. CALHOUN 442 (1977) [hereinafter CALHOUN PAPERS]; Speech, reprinted in 3 THE WORKS OF JOHN C. CALHOUN 37-38 (R. Crallé ed. 1853) [hereinafter CALHOUN WORKS] (Senate speech of Feb. 20, 1837, on resolution to purchase Madison’s papers); see also Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 926-27 & n.223 (1985).

101. 4 ELLIOT’S DEBATES, *supra* note 98, at 546.

102. See J. SMITH, *supra* note 94, at 57-93. The bill had already passed the Senate, but the debates there are not reported. See 7 ANNALS OF CONG. 548-75 (1798).

103. 8 ANNALS OF CONG. 1981 (1798) (“Or will gentlemen say that the Constitution affords a security to citizens which it does not extend to aliens? . . . The trial by jury does not speak of citizens, but of persons.”). Actually, Article III speaks of “[t]he trial of all Crimes,” and the Sixth Amendment speaks of “the accused,” but let that pass.

104. 8 ANNALS OF CONG. 2018 (1798) (remarks of Rep. Otis); see also *id.* at 1984-85 (remarks of Rep. William Gordon) (aliens not among those for whose use and benefit Constitution was formed).

no rights under it.<sup>105</sup> The rights of citizens were determined by the Constitution, but the rights of aliens by the law of nations.<sup>106</sup> References to Vattel showed that aliens could be expelled at will under the law of nations, which afforded no trial by jury.<sup>107</sup>

The argument of George Keith Taylor, who led the Federalist attack on the Resolutions, shifted repeatedly between two versions of this argument. One form, which today we would say was based on the right/privilege distinction, started with the proposition that, under the law of nations (as also under American domestic law), the alien has no right to remain. Expulsion therefore does not deprive the alien of liberty or any other right, and procedural rights do not attach. The second version of the argument went further, insisting that "aliens not being a party to the compact, were not bound by it to the performance of any particular duty, nor did it confer upon them any rights."<sup>108</sup>

After Republicans supplemented the Virginia Resolutions with an *Address of the General Assembly to the People of the Commonwealth of Virginia*,<sup>109</sup> the Federalists issued an *Address of the Minority*.<sup>110</sup> The evidence indicates that George Keith Taylor's brother-in-law, John Marshall, took a hand in writing this *Address*, along with General Henry Lee.<sup>111</sup> For whatever reason, the claim that aliens had no rights disappeared from the minority's argument—they defended the constitutionality of the Alien Act on narrower grounds, including the right/privilege argument:

Certainly a vested right is to be taken from no individual without a solemn trial, but the right of remaining in our country is vested in no

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105. Debate on Virginia Resolutions, reprinted in THE VIRGINIA REPORT OF 1799-1800, TOUCHING THE ALIEN AND SEDITION LAWS; TOGETHER WITH THE VIRGINIA RESOLUTIONS OF DECEMBER 21, 1798, THE DEBATE AND PROCEEDINGS THEREON IN THE HOUSE OF DELEGATES OF VIRGINIA, AND SEVERAL OTHER DOCUMENTS ILLUSTRATIVE OF THE REPORT AND RESOLUTIONS 34 (1850) [hereinafter *Virginia Debates*] (statement of George K. Taylor); *id.* at 73 (statement of Archibald Magill); *id.* at 102 (statement of William Cowan); see also *id.* at 105 (statement of Henry Lee) ("It was wonderfully kind, he said, in our fathers to devote their time and money to the care of the Turk, Gaul, and Indian, when the proper object was that of their children.").

106. *Id.* at 35 (statement of George K. Taylor); *id.* at 100 (statement of William Cowan).

107. *Id.* at 34-35 (statement of George K. Taylor); *id.* at 102 (statement of William Cowan).

108. *Id.* at 34.

109. Address of the General Assembly to the People of the Commonwealth of Virginia, reprinted in 6 THE WRITINGS OF JAMES MADISON 332 (G. Hunt ed. 1906) [hereinafter *Address of the General Assembly*].

110. Address of the Minority in the Virginia Legislature to the People of that State; containing a Vindication of the Constitutionality of the Alien and Sedition Laws (1799) [hereinafter *Address of the Minority*], in AMERICAN ANTIQUARIAN SOCIETY, EARLY AMERICAN IMPRINTS 1639-1800 (microfiche) (Evans No. 36635).

111. See R. BEEMAN, *supra* note 97, at 196; *Editorial Note*, in 3 THE PAPERS OF JOHN MARSHALL 498-99 & n.1 (1979). Marshall was the only major Federalist who publicly criticized the Alien and Sedition Acts, though he called them ill-advised, not unconstitutional. *To a Freeholder*, Sept. 20, 1798, reprinted in 3 THE PAPERS OF JOHN MARSHALL at 505-06; see R. BEEMAN, *supra* note 97, at 196 n.34, 205; 2 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 388-91, 451-52 (1916).

alien; he enters and remains by the courtesy of the sovereign power, and that courtesy may at pleasure be withdrawn.<sup>112</sup>

Lee also omitted the nativist claim from his succeeding series of essays, *Plain Truth*, although he vigorously maintained that only the people of the United States, and not the states, formed the Constitution.<sup>113</sup>

More extreme Federalists, however, continued to employ the membership argument. A House select committee repeated it in the Report to the House of Representatives on the inexpediency of repealing the Alien and Sedition Acts:

It is answered in the first place, that the Constitution was made for citizens, not for aliens, who of consequence have no rights under it, but remain in the country and enjoy the benefit of the laws, not as matter of right, but merely as matter of favor and permission, which favor and permission may be withdrawn whenever the Government charged with the general welfare shall judge their further continuance dangerous.<sup>114</sup>

The legislatures of Massachusetts and Vermont incorporated it in their official replies to the Virginia and Kentucky Resolutions, respectively.<sup>115</sup>

In Pennsylvania, an aggressive state court judge named Alexander Addison, who had already played a role in putting down the Whiskey Rebellion, also devoted his energies to these polemics.<sup>116</sup> He included *A Defence of the Alien Act*<sup>117</sup> among his published grand jury charges. He maintained that "aliens

112. Address of the Minority, *supra* note 110, at 9-10. See also Justice Iredell's defense of the Alien Act, in his charge to the grand jury in the notorious treason prosecution of John Fries:

The clause in the constitution, declaring that the trial of all crimes, except by impeachment, shall be by jury, can never in reason be extended to amount to a permission of perpetual residence of all sorts of foreigners, unless convicted of some crime, but is evidently calculated for the security of any citizen, a party to the instrument, or even of a foreigner if resident in the country, who, when charged with the commission of a crime against the municipal laws for which he is liable to punishment, can be tried for it in no other manner.

Case of Fries, 9 F. Cas. 826, 834 (C.C.D. Pa. 1799) (No. 5,126).

113. H. Lee, *Plain Truth: Addressed to the People of Virginia, Written in February 1799—By a Citizen of Westmoreland County, (Virg.)* 19-21 (1799) in *AMERICAN ANTIQUARIAN SOCIETY, EARLY AMERICAN IMPRINTS 1639-1800* (microfiche) (Evans No. 35723); see also *Editorial Note*, in 3 *THE PAPERS OF JOHN MARSHALL*, *supra* note 111, at 499-500 & 500 n.4 (discussing Lee's publication of the essays).

114. 9 *ANNALS OF CONG.* 2987 (1799).

115. Answer of the Commonwealth of Massachusetts to the Virginia Legislature, Feb. 9, 1799, reprinted in 4 *ELLIOT'S DEBATES*, *supra* note 98, at 533, 534 (the Alien Act "respects a description of persons whose rights were not particularly contemplated in the Constitution of the United States"); Answer to the Resolutions of the state of Kentucky, Oct. 29, 1799, 4 *RECORDS OF THE GOVERNOR AND COUNCIL OF THE STATE OF VERMONT* 525, 528 (1876) ("We ever considered that the Constitution of the United States was made for the benefit of our own citizens; we never conjectured that aliens were any party to the federal compact; we never knew that aliens had any rights among us, except what they derived from the law of nations, and rights of hospitality . . .").

116. See R. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 164 (1971); J. MILLER, *supra* note 94, at 139-41. On Addison generally, see *THE WHISKEY REBELLION: PAST AND PRESENT PERSPECTIVES* 49-60, 165-82 (S. Boyd ed. 1985); Rowe, *Alexander Addison: The Disillusionment of a "Republican Schoolmaster"*, 62 *W. PA. HIST. MAG.* 221 (1979).

117. *Charges to Grand Juries of the Counties of the Fifth Circuit in the State of Pennsylvania*, No. 26, in 1 *ADDISON'S REPORTS* 590 (A. Addison 2d ed. 1883) [hereinafter *Charges*]. Political speeches to

are not parties to [the Constitution], and therefore can claim no benefit under it, unless they are expressly named."<sup>118</sup> Addison further elaborated his argument in a pamphlet attacking Madison's 1800 Report for the Virginia Assembly.<sup>119</sup> He emphasized that the people of the United States were one people, raised to nationhood by the Declaration of Independence.<sup>120</sup> The foreign affairs powers, including power over aliens, were extraconstitutional:

The restrictions of the constitution are not restrictions of external and national right, but of internal and municipal right. And power over aliens is to be measured, not by internal and municipal law, but by external and national law. It affects not the people of the United States, parties and subjects to the constitution; but foreign governments, whose subjects the aliens are.<sup>121</sup>

Naturalization changed an alien's status by conferring a vested right, but admission of an alien to reside in the United States did not.<sup>122</sup> "As aliens are not entitled to the privileges of citizens, any farther than the constitution and laws direct, and as the constitution says nothing of them, the legislature has a right to prescribe in what manner they shall be dealt with."<sup>123</sup>

Thus, the repertoire of Federalist defenses of the Alien Act included a portrayal of the Constitution as a contract among the American people, for their sole benefit. Even resident aliens had no rights against Congress under such a Constitution, but rather were remitted to a background source of law, the law of nations, for whatever protection it afforded them.

The Federalists' social contract argument against aliens' rights may be most strongly articulated through a combination of solidaristic republicanism<sup>124</sup> and textual interpretation. The republican argument for withholding constitutional

grand juries were quite common at this period. See G. HASKINS & H. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL 1801-1815, at 221-23 (1981) (HOLMES DEVISE HISTORY Vol. 2) (discussing impeachment of Justice Chase, which rested in part on his grand jury charges). Addison himself was ultimately impeached (and convicted) by the Pennsylvania legislature in 1803, due in part to his interference with a Republican associate judge's attempt to refute one of Addison's grand jury charges. See R. ELLIS, *supra* note 116, at 164-65; TRIAL OF ALEXANDER ADDISON, ESQ., ... TAKEN IN SHORT HAND BY THOMAS LLOYD (2d ed. 1803).

118. *Charges*, *supra* note 117, at 597. Congress could suspend the writ of habeas corpus with respect to aliens whenever it pleased, and could convict them of crimes without jury trial. *Id.* at 591, 599.

119. Addison, Analysis of the Report of the Committee of the Virginia Assembly (1800), reprinted in 2 C. HYNEMAN & D. LUTZ, AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805, at 1055 (1983).

120. *Id.* at 1070. On the notion of preconstitutional sovereignty vested in the United States, see *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316-18 (1936); *Penhallow v. Doane*, 3 U.S. (3 Dall.) 54 (1795). But see Levitan, *supra* note 30 (classic critique of notion).

121. Addison, *supra* note 119, at 1070.

122. *Id.* at 1073; see also *Charges*, *supra* note 117, at 597-98. It may be remarked that Addison himself was born in Scotland, and emigrated in 1785. See Rowe, *supra* note 116, at 229. On Addison's xenophobia in the late 1790's, see *id.* at 245-46.

123. Addison, *supra* note 119, at 1073.

124. See, e.g., Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1495-96 (1988) (criticizing this form of republican tradition).



rights from aliens rests on behavioral assumptions differing from those of both Hobbes<sup>125</sup> and Vattel. In a republic,

each man must somehow be persuaded to submerge his personal wants into the greater good of the whole. This willingness of the individual to sacrifice his private interests for the good of the community—such patriotism or love of country—the eighteenth century termed “public virtue.” A republic was such a delicate polity precisely because it demanded an extraordinary moral character in the people.<sup>126</sup>

A constitutional structure designed in the hope of maintaining this delicate polity might confer rights that could not be safely entrusted to outsiders. When defining qualifications for citizenship, political rights, and officeholding, many in the new nation expressed concern that foreign immigrants were insufficiently attached to the good of the country or to republican principles.<sup>127</sup> Nonimmigrant visitors could pose an even greater threat, especially if they were loyal citizens of another republic. As the French Revolution turned radical, some Federalists feared that its propagandists would also corrupt the American people.<sup>128</sup> “Aliens having the least interest in the prosperity of this country,” charged Judge Addison, “and owing the least duty (only a temporary duty) to it, were the most likely to yield themselves the readiest agents of France.”<sup>129</sup>

Presuming that the limited electorate, a majority of which ratified the Constitution, had authority, the Preamble to the Constitution indicates that this ratifying electorate represented, and acted on behalf of, the entire People. Recalling that the Constitution sets forth the mutual agreements of the People might give some reason for interpreting its provisions as relating only to citizens except where the context obviously dictates otherwise.<sup>130</sup> Thus, the solidaristic strain in republicanism could exert its exclusionary force on the

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125. Hobbes' antisocial assumptions are so extreme that citizens have no greater reason to trust one another than to trust aliens. Correspondingly, an alien who enters the territory without the protection of a treaty becomes a fellow subject. See *supra* note 65 and accompanying text. No constitutional rights protect the (former) alien, because there are none.

126. G. WOOD, *supra* 50, at 68. This is where Rousseau would have become relevant. But it was obviously impossible for the extreme Federalist opponents of French revolutionary sedition to invoke Rousseau in opposition to the Jeffersonians, and they did not. See *supra* note 51.

127. See J. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870*, at 214-19, 225-30, 236-38 (1978). The Constitution sets both citizenship and residence requirements for Senators, Representatives and the President; indeed the latter must be a “natural born Citizen.” U.S. CONST. art. I, § 2, cl. 2; *id.* at § 3, cl. 3; *id.* at art. II, § 1, cl. 5.

128. See, e.g., R. BEEMAN, *supra* note 97, at 134-35, 196-97; J. SMITH, *supra* note 94, at 11-17, 96-104 (1956).

129. *Charges*, *supra* note 117, at 601; see *id.* at 529-39, 574-75, 581, 586-87, 592-93, 602-05; Rowe, *supra* note 116, at 246-48.

130. E.g., U.S. CONST. art. I, § 2, cl. 2 (“No Person shall be a Representative”); *id.* art. I, § 9, cl. 1 (“The Migration or Importation of Such Persons”); *id.* art. I, § 9, cl. 8 (“[N]o Person holding any Office”); *id.* art. III, § 2, cl. 1 (“foreign States, Citizens, or Subjects”); *id.* art. IV, § 2, cl. 3 (“No Person held to Service”).

entire Constitution through a membership-oriented interpretation of the social contract.

## 2. *Jeffersonians and the "Municipal Law" Approach*

The opposition party, in the course of refuting the Federalists' membership argument, developed a different statement of the Constitution's character. When the membership argument surfaced in the House debates on the Alien bill, Edward Livingston made a two-fold response. Like Gallatin,<sup>131</sup> he emphasized that the relevant clauses of the Constitution used general language, and that an alien surely was a "person."<sup>132</sup> But he also invoked the traditional doctrine linking allegiance to protection:

It is an acknowledged principle of the common law, the authority of which is established here, that alien friends . . . residing among us, are entitled to the protection of our laws, and that during their residence they owe a temporary allegiance to our Government. If they are accused of violating this allegiance, the same laws which interpose in the case of a citizen must determine the truth of the accusation, and if found guilty they are liable to the same punishment.<sup>133</sup>

With further development, this argument eventually provided a normative basis for freeing constitutional guarantees from the restrictive implications of the Preamble.

In presenting the Resolutions to the Virginia House of Delegates, John Taylor of Caroline<sup>134</sup> distinguished between the Alien Act's violation of the Constitution and its denial of human or natural rights.<sup>135</sup> The constitutional defects he identified were deprivation of common law rights without due process, denial of trial by jury, and exercise of judicial power by the President.<sup>136</sup> The natural rights were "freedom of speech, freedom of person, a right to justice, and to a fair trial."<sup>137</sup>

Taylor supported aliens' entitlement to constitutional rights with three arguments. First, he relied on the generality of the text: the due process clause

131. See *supra* note 103 and accompanying text.

132. 8 ANNALS OF CONG. 2012-13 (1798).

133. *Id.* at 2012.

134. John Taylor "of Caroline [County, Virginia]," a figure better known to historians than to lawyers, was an agrarian republican whose career included episodes of political activity and episodes of dense writing in political theory. He professed belief in immutable natural rights and viewed the Constitution as a mutable "political law" designed to distribute power so as to protect them. See, e.g., J. TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 159-61, 413-15, 422-25 (1814). See generally C.W. HILL, THE POLITICAL THEORY OF JOHN TAYLOR OF CAROLINE (1977); E. MUDGE, THE SOCIAL PHILOSOPHY OF JOHN TAYLOR OF CAROLINE: A STUDY IN JEFFERSONIAN DEMOCRACY (1939); R. SHALHOPE, JOHN TAYLOR OF CAROLINE: PASTORAL REPUBLICAN (1980).

135. Virginia Debates, *supra* note 105, at 24.

136. *Id.* at 25, 116.

137. *Id.* at 27.

"literally reached aliens, by using in all places the term 'persons,' not 'natives;'"<sup>138</sup> Article III extended the judicial power to "all cases," and required the trial of "all crimes" by jury.<sup>139</sup> Second, he gave a strong republican argument that favored the literal interpretation. The Alien Act transgressed fundamental republican principles by creating a class of persons wholly dependent on the President.<sup>140</sup> Grave dangers to the liberty of citizens would result from "making a President in fact a king of the aliens."<sup>141</sup> Moreover, accepting this distortion would serve as a precedent for future usurpations in the construction of the Constitution.<sup>142</sup> Third, even under the law of nations, aliens "were entitled and subjected to the sanctions of municipal law," and "the Constitution was a sacred portion of municipal law."<sup>143</sup> In rejecting the claim that aliens' rights were defined by international law rather than by the Constitution, Taylor invoked the orthodox Jeffersonian principle of construction: the federal government had only enumerated powers, and could not "at pleasure dip their hands into the inexhaustible treasuries of the common law and law of nations."<sup>144</sup>

Madison incorporated similar arguments in his 1800 Report. Of course, in defending the Virginia Resolutions, he could not deny that the Constitution was a compact; nor did he claim that aliens were parties to it. But he pointed out that the parties, for reasons of their own, might nonetheless have limited federal power over aliens:

[I]t is said, that aliens not being parties to the Constitution, the rights and privileges which it secures cannot be at all claimed by them.

To this reasoning, also, it might be answered that, although aliens are not parties to the Constitution, it does not follow that the Constitution has vested in Congress an absolute power over them. The parties to the Constitution may have granted, or retained, or modified, the power over aliens, without regard to that particular consideration.<sup>145</sup>

He emphasized the extreme to which the Federalists had taken the argument: "If aliens had no rights under the Constitution, they might not only be banished,

138. *Id.* at 25.

139. *Id.* at 116.

140. *Id.* at 25. He coupled this danger with the standard republican terrors of corruption, patronage, and standing armies. *Id.*; see F. McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 77-78 (1985). Taylor retained the emphasis on patronage and corruption throughout his writings. See J. TAYLOR, *CONSTRUCTION CONSTRUED AND CONSTITUTIONS VINDICATED* 69 (1820 & reprint of 1970); C.W. HILL, *supra* note 134, at 266-67; R. SHALHOPE, *supra* note 134, at 204-05, 213-15.

141. Virginia Debates, *supra* note 105, at 116.

142. *Id.* at 25.

143. *Id.* at 116; see also *id.* at 68-69 (statement of James Barbour, citing Vattel); *id.* at 88 (statement of William Daniel, Jr.).

144. *Id.* at 115-16; see J. TAYLOR, *supra* note 140, at 279-89.

145. Madison's Report on the Virginia Resolutions, reprinted in 4 ELLIOT'S DEBATES, *supra* note 98, at 556.

but even capitally punished, without a jury or the other incidents to a fair trial."<sup>146</sup> He did not spell out in the Report why the parties to the Constitution would have taken the trouble to erect so high a barrier against such a result, although he did observe that the practices of "barbarous countries, under undefined prerogatives, or amid revolutionary dangers, . . . will not be deemed fit precedents for the government of the United States."<sup>147</sup>

The Report continued:

But a more direct reply is, that it does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws than they are parties to the Constitution; yet it will not be disputed that, as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage.<sup>148</sup>

Madison viewed as fundamental the distinction between alien enemies and alien friends.<sup>149</sup> As to alien enemies, the Constitution's grant of the war power gave Congress the usual authority under the law of nations.<sup>150</sup> The legal relations of alien friends, however, are not so defined:

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146. *Id.* To the contrary, the traditional practice of the municipal law in criminal cases was considerably more generous: "But so far has a contrary principle been carried, in every part of the United States, that, except on charges of treason, an alien has, besides all the common privileges, the special one of being tried by a jury, of which one-half may be also aliens." *Id.* Here he was alluding to the institution of the jury *de medietate linguae*, see, e.g., LaRue, *A Jury of One's Peers*, 33 WASH. & LEE L. REV. 841, 847-66 (1976). He may have overstated its omnipresence, although it was still the law in Virginia. See *United States v. Cartacho*, 25 F. Cas. 312 (C.C.D. Va. 1823) (No. 14,738) (Marshall, C.J. & St. George Tucker, J.). But see *United States v. McMahon*, 26 F. Cas. 1131 (C.C.D.C. 1835) (No. 15,699) (citing Maryland Act of 1789, ch. 22, § 5 (abolishing mixed juries)).

Madison was under no illusion that jury trial was a natural right; in presenting what would become the Sixth Amendment to the House of Representatives, he had commented:

Trial by jury cannot be considered as a natural right, but rather a right resulting from a social compact, which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature.

1 ANNALS OF CONG. 437 (1789).

147. 4 ELLIOT'S DEBATES, *supra* note 98, at 557. In an earlier treatment of the issue, Madison had given the "undefined prerogatives" a fuller republican statement, asking, "will an accumulation of power so extensive in the hands of the Executive, over aliens, secure to natives the blessings of republican liberty?", and predicting that expansion of presidential power would lead to corruption of the people's representatives, maintenance of standing armies, and a decay into monarchy. Address of the General Assembly, *supra* note 109, at 338.

148. 4 ELLIOT'S DEBATES, *supra* note 98, at 556.

149. "Alien enemies" are the subjects of an enemy nation in time of war; all others are "alien friends." See, e.g., 1 W. BLACKSTONE, *supra* note 74, at \*360-61.

150. This, of course, is a serious weakness in Madison's argument. Putting aside the federalism question, he did not adequately explain how executive expulsion of alien enemies could be reconciled with separation of powers, due process, or the jury trial guarantee, or why it need not be. Rationalization of expulsion as a nonpunitive civil proceeding could carry over from alien enemies to alien friends, as it ultimately did. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

Alien friends, except in the single case of public ministers, are under the municipal law, and must be tried and punished according to that law only.

. . . . the offence being committed by the individual, not by his nation, and against the municipal law, not against the law of nations,— the individual only, and not the nation, is punishable; and the punishment must be conducted according to the municipal law, not according to the law of nations.<sup>151</sup>

For all the usual reasons, the Alien Act was “repugnant to the constitutional principles of municipal law.”<sup>152</sup>

Thus, even while reserving to the states the rights of a compact, Madison asserted the character of the Constitution as *law*. Aliens, by exposing themselves to the burdens of the municipal law, were entitled to insist on the observance of the whole of the municipal law, including the “particular organization and positive provision of the Federal Constitution.”<sup>153</sup>

The reconciliation of social contract theory with the actual, known constitutional history of the young nation presented difficulties that would become more urgent as sectionalism evolved toward disunionism. The origins of most societies were veiled by the mists of antiquity, but the history of Englishmen in America was documented, and the federal Constitution had recently been established in the name of the people to form a more perfect union. That Constitution was clearly not a contract between the people and the new government, an artificial entity that did not yet exist.<sup>154</sup> “Only a social agreement among the people, only such a Lockean contract, seemed to make sense of their rapidly developing idea of a constitution as a fundamental law designed by the people to be separate from and controlling of all the institutions of government.”<sup>155</sup> As Hamilton wrote in *The Federalist No. 78*, “A constitution is, in fact, and must be regarded by the judges, as a fundamental law.”

Because Vattel had explicitly prefigured this conception of a constitution as a fundamental law decreed by the people after their act of union, one may regret his failure to address whether fundamental laws were included among the laws to which aliens were entitled. But the Madisonian defense treated an affirmative answer as following a fortiori. It may be restated as follows: Aliens, being people, have the same natural rights as others. A constitution is a positive municipal law, the purpose of which is to structure the institutions of the state in ways that facilitate government while safeguarding natural rights (though whose rights may be debated). Even from the citizens’ point of view, protecting the rights of aliens made sense. The rights (natural or otherwise) of aliens and

151. 4 ELLIOT’S DEBATES, *supra* note 98, at 556-57.

152. *Id.* at 557.

153. *Id.* at 560.

154. G. WOOD, *supra* note 50, at 600-01.

155. *Id.* at 283; *see id.* at 282-91, 535-53; Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 859-65 (1978).

of citizens are intertwined, and oppression of aliens could indirectly harm citizens.<sup>156</sup> Moreover, as the Jeffersonian federalism-based argument illustrates, elimination of aliens' negative liberty vis-à-vis the federal government decreases the positive liberty of citizens acting within their states, because a state power to admit aliens and an unbridled federal power to expel them cannot coexist. And, in the paranoid vein beloved by republican thinkers, aliens rendered dependent by unchecked government power would become tools for subversion of the liberty of citizens.

More fundamental, however, was the argument grounded in obedience. By entering the country, aliens subject themselves to the power of the government and the requirements of municipal law in almost every respect just as citizens do.<sup>157</sup> Their consent is no more tacit than that of most citizens, and their natural rights share the risk of government abuses.<sup>158</sup> To the extent that the constitution's language does not exclude aliens from its coverage, therefore, its positive provisions should be applied so as to ensure respect for natural obligation.

### B. *The Dominance of the Municipal Law Approach*

The debates on the Alien Act produced no obvious immediate winner. In retrospect, the outcome seems personified in the rise of John Marshall, one of the moderate Federalists who defended the Act without denying the constitutional rights of aliens.<sup>159</sup> John Adams never directly employed the powers granted to him under the Alien Act. He did sign warrants for the arrest of several outspoken foreigners, at the urging of his extremist Secretary of State,

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156. Americans hoped to benefit from both commercial visits and immigration; binding the federal government to ensure the extension of most constitutional rights to visitors and immigrants would encourage such arrivals. *See, e.g.,* Taylor v. Carpenter, 23 F. Cas. 744, 749-50 (C.C.D. Mass. 1846) (No. 13,785); 2 TUCKER'S BLACKSTONE APP. 99 (1803); *cf.* The Declaration of Independence ("He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws of Naturalization of Foreigners; refusing to pass others to encourage their migrations hither . . .").

157. It may be worth noting some exceptions. Depending on one's view about freedom of expatriation—which Vattel favored, but the common law opposed—the alien may have a stronger right than the citizen to leave the country when she feels exploited. *See* 3 E. DE VATTEL, *supra* note 51, at 146. There may also be some legal obligations of citizens that the state cannot extend to aliens. *Id.* The possibility of diplomatic intervention in case of a state's denial of justice to an alien may create an avenue of protection different from those available to citizens. *See* S. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 317-18 (1987). These factors may not be compelling, but they impair the neatness of the syllogism if, like Wolff, you have a taste for syllogisms, and they may make a difference at the margin if you have a taste for marginal thinking.

158. This understatement may roughly compensate for the factors in the preceding footnote.

159. *See supra* note 111 and accompanying text. Marshall had also taken a moderate stance—agreeing with the Jeffersonians that federal power over aliens was subject to constitutional limits, but disagreeing about what those limits were—in his most famous speech in Congress, his defense of Adams' extradition of Jonathan Robbins to the British. 10 ANNALS OF CONG. 596-618 (1800); 4 THE PAPERS OF JOHN MARSHALL, *supra* note 111, at 82-109; *see* 2 A. BEVERIDGE, *supra* note 109, at 458-75; Cress, *The Jonathan Robbins Incident: Extradition and the Separation of Powers in the Adams Administration*, 111 ESSEX INSTITUTE HISTORICAL COLLECTIONS 99 (1975); Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229 (1990).

Timothy Pickering, but they either left voluntarily or evaded capture.<sup>160</sup> By the time the Act expired in June 1800, Adams had dismissed Pickering, and replaced him with Marshall. At the end of Adams' term, Marshall became Chief Justice.

In his three-and-a-half decades as Chief Justice, John Marshall's Court rendered decisions on numerous points that had figured in the debates on the Alien and Sedition Acts and the Virginia and Kentucky Resolutions.<sup>161</sup> The character of the Constitution as law or compact figured prominently in Marshall's struggle with the emerging Southern states' rights school. In a further metamorphosis of the Virginia Resolutions and Report, the states' rights movement insisted that the states were the focus of the social contract(s), and that, as separate sovereignties rather than as a united people, they had then become parties to the Constitution as a compact. The law of nations provided models for the remedial rights of confederated sovereigns, including self-help and dissolution. This dispute also became significant in controversies over the geographical scope of the Constitution, to which we will turn in Part III. But as regards the rights of aliens, it should be emphasized that the polemics of Spencer Roane,<sup>162</sup> John Taylor,<sup>163</sup> and later the South Carolina Nullifiers,<sup>164</sup> created pressure for the Supreme Court and its supporters to emphasize the character of the Constitution as what Marshall had called it in *Marbury v. Madison*—a "fundamental and paramount law."<sup>165</sup> This emphasis on the Constitution as law supported Madison's argument that aliens could claim its benefits.

The Marshall Court repeatedly protected aliens against the states by vindicating the authority of federal treaties, which the Constitution made "the supreme Law of the Land."<sup>166</sup> The Taney Court continued this approach,

160. J. SMITH, *supra* note 94, at 159-76.

161. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

162. See *Hunter v. Martin*, 18 Va. (4 Munf.) 1, 30-33, 52-53 (1815) (opinion of Roane, J.); Roane, *Hampden No. 4*, in JOHN MARSHALL'S DEFENSE OF McCULLOCH V. MARYLAND, 146-47 (G. Gunther ed. 1969) [hereinafter DEFENSE OF McCULLOCH].

163. See, e.g., J. TAYLOR, *supra* note 140, at 142-48; J. TAYLOR, NEW VIEWS OF THE CONSTITUTION OF THE UNITED STATES 171-73 (1823); R. SHALHOPE, *supra* note 134, at 208-09.

164. See *infra* text accompanying notes 220-23.

165. 5 U.S. (1 Cranch) 137, 177 (1803); see *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 380-81, 413-15 (1821); 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 338-340 (1833); Marshall, *A Friend of the Constitution No. 9*, in DEFENSE OF McCULLOCH, *supra* note 162, at 208; see also E. BAUER, COMMENTARIES ON THE CONSTITUTION 1790-1860, at 276-87 (1952); Powell, *supra* note 100, at 942-44 (relating rejection of compact theory to Court's interpretive methodology).

166. See, e.g., *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242 (1830); *Society for the Propagation of the Gospel in Foreign Parts v. Town of New Haven*, 21 U.S. (8 Wheat.) 464 (1823); *Orr v. Hodgson*, 17 U.S. (4 Wheat.) 453 (1819); *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259, 271 (1817); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 627 (1813). All the foregoing cases involve property rights.

Marshall had a direct financial stake in this process because of his major investment in the Fairfax estate. 2 A. BEVERIDGE, *supra* note 111, at 202; G.E. WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 1815-35, at 165-73 (1988) (HOLMES DEVISE HISTORY, Vol. III-IV).

scrutinizing state measures against aliens for inconsistency with treaties, the federal commerce power, and federal control of foreign affairs.<sup>167</sup> Nonetheless, despite a variety of dicta in the Supreme Court and on circuit,<sup>168</sup> no case before the Civil War gave the Court occasion to hold that aliens were possessors of constitutional rights. One major factor contributing to this silence was the fact that the Bill of Rights applied only to the federal government,<sup>169</sup> while the regulation of aliens was carried out largely by the states. This area of the law did not escape the pervasive influence of slavery:<sup>170</sup> the distribution of authority between the states and the federal government regarding admission of aliens had explosive potential in antebellum society, because slave states insisted on control over the entry of free persons of color.<sup>171</sup>

The notion that rights might be limited to parties to the social contract did not disappear altogether. Although Taney did not address the rights of white aliens in the Dred Scott decision, he did combine elements of social contract reading of the Constitution with pseudo-historical positivistic analysis in order to conclude that Blacks, whether slave or free, were permanently excluded from the people of the United States, for whose sole benefit and protection the Constitution was formed.<sup>172</sup> Even as to white aliens, the nativist Samuel F. B. Morse argued in an anti-Catholic tract that the Preamble demonstrated the framers' intent to limit the blessings of liberty to "*ourselves and our posterity*."<sup>173</sup>

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167. *Passenger Cases*, 48 U.S. (7 How.) 283 (1849) (invalidating state taxes on transatlantic passengers); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540 (1840) (majority of court views state's agreement to extradite alien to foreign country as encroachment on federal power, but court divides on characterization of facts of record, and dismisses for lack of jurisdiction; state court then concludes alien must be released). *But see Mager v. Grima*, 49 U.S. (8 How.) 490 (1850) (upholding discriminatory inheritance tax).

168. *See In re Kaine*, 55 U.S. (14 How.) 103, 141 (1853) (Nelson, J., dissenting from dismissal of petition for writ of habeas corpus on combined bases of jurisdiction and merits) ("[U]nder our system of laws and principles of government, so far as respects personal security and personal freedom, I know of no distinction between the citizen and the alien who has sought an asylum under them."); *Taylor v. Carpenter*, 23 F. Cas. 742, 744 (C.C.D.Mass. 1844) (No. 13,784) ("[I]n the courts of the United States, under the constitution and laws, they are entitled, being alien friends, to the same protection of their rights as citizens."); *Society for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (C.C.D.N.H. 1814) (No. 13,156); *see also* J. STORY, *supra* note 41, at § 541 (1834).

169. *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

170. *See Passenger Cases*, 48 U.S. (7 How.) 283, 428 (1849) (opinion of Wayne, J.) (affirming state power to exclude free Blacks); *id.* at 457 (opinion of Grier, J.) (same); *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837) (affirming state police power over passengers detrimental to its welfare); C. SWISHER, *THE TANEY PERIOD 1836-64* at 378-95 (1974) (HOLMES DEVISE HISTORY, Vol. V); *cf. In re Ah Fong*, 1 F. Cas. 213, 216 (C.C.D. Cal. 1874) (No. 102) (Field, Circuit Justice) ("[W]e cannot shut our eyes to the fact that much which was formerly said upon the power of the state in this respect, grew out of the necessity which the southern states, in which the institution of slavery existed, felt of excluding free negroes from their limits.").

171. *See, e.g.,* Hamer, *Great Britain, the United States, and the Negro Seamen Acts, 1822-1848*, 1 J. S. HIST. 1 (1935).

172. *Scott v. Sandford*, 60 U.S. (18 How.) 393, 406, 409-11, 416-17 (1857); *see* D. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 355 (1978); P. FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* 279-82 (1981).

173. S. MORSE, *IMMINENT DANGERS TO THE FREE INSTITUTIONS OF THE UNITED STATES THROUGH FOREIGN IMMIGRATION* 23 (1835 & photo. reprint 1969) (emphasis in original). Morse was linked to the Francophobia of the 1790's through his father, the Federalist clergyman Jedidiah Morse. *See* D. BENNETT,



The decisive testing ground for the question of aliens' rights emerged with the anti-Chinese movement on the West Coast.<sup>174</sup> Before 1868, the California Supreme Court invalidated discriminatory state legislation on supremacy clause and commerce clause grounds.<sup>175</sup> But the peculiar circumstances that had paralyzed the federal government in matters of race were transformed by the Civil War. The legislative history of the 1866 Civil Rights Act and the Fourteenth Amendment reflected attention to mistreatment of the Chinese on the Pacific coast.<sup>176</sup> Both the wording of the Fourteenth Amendment and the debates call attention to the rights of aliens as "persons" within the due process and equal protection clauses.<sup>177</sup> The 1870 Civil Rights Act supplemented these clauses with a fuller listing of some relevant protections.<sup>178</sup> Thus reinforced, the federal courts entered into a lengthy struggle with California.<sup>179</sup>

The occasion thereby arose for the Supreme Court to declare unequivocally that aliens were persons entitled to rights afforded in general terms by the Constitution. Invalidating yet another persecution of the Chinese in California, the Court unanimously stated in *Yick Wo v. Hopkins*:

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: "Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.<sup>180</sup>

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THE PARTY OF FEAR 24-25, 40-41 (1990); J. PHILIPS, JEDIDIAH MORSE AND NEW ENGLAND CONGREGATIONALISM 74-101, 220-21 (1983).

174. See generally, M. COOLIDGE, CHINESE IMMIGRATION 55-82 (1968); R. DANIELS, ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850 29-40 (1988); R. TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 81-115 (1989); McClain, *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CALIF. L. REV. 529 (1984).

175. *Lin Sing v. Washburn*, 20 Cal. 534 (1862); *People v. Downer*, 7 Cal. 169 (1857).

176. See CONG. GLOBE, 39th Cong., 1st Sess. 2891-92 (1866) (remarks of Sen. Conness); see also *id.* at 497-98 (colloquy regarding exclusion and citizenship for Chinese); *id.* at 1757 (remarks of Sen. Trumbull on Pres. Johnson's objection to conferral of citizenship on Chinese children); Neuman, *Back to Dred Scott?*, 24 SAN DIEGO L. REV. 485, 491-92 (1987).

177. E.g., CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866) (remarks of Rep. Bingham); see *Plyler v. Doe*, 457 U.S. 202, 214-15 (1982); R. BERGER, GOVERNMENT BY JUDICIARY 215-20 (1977).

178. Act of May 31, 1870, §§ 16, 17, 16 Stat. 144; see McClain, *supra* note 174.

179. See *In re Quong Woo*, 13 F. 229 (C.C.D. Cal. 1882) (invalidating laundry licensing law, on treaty and other grounds); *In re Ah Chong*, 2 F. 733 (C.C.D. Cal. 1880) (invalidating statute forbidding Chinese to fish, on treaty and equal protection grounds); *In re Parrott*, 1 F. 481 (C.C.D. Cal. 1880) (invalidating statute forbidding employment of Chinese, on treaty and equal protection grounds); *Ho Ah Kow v. Nunan*, 12 F. Cas. 252 (C.C.D. Cal. 1879) (No. 6,546) (invalidating queue ordinance, on equal protection grounds); *In re Ah Fong*, 1 F. Cas. 213 (C.C.D. Cal. 1874) (No. 102) (invalidating state immigration law, on treaty, statute and equal protection grounds); cf. *People v. Brady*, 40 Cal. 198 (1870) (purporting to hold that refusing Chinese right to testify against whites does not deny them equal protection).

180. 118 U.S. 356, 369 (1886).

Abolition removed the legal commitment to slavery that had inhibited judicial affirmation of the Constitution's "universal" protection of persons within the United States.

With this principle settled, other major issues of the Alien Act debate—the substantive and procedural scope of the federal deportation power—were refought over the next decade in the Supreme Court, in the context of the new federal immigration laws. In *Fong Yue Ting v. United States*<sup>181</sup> the Court upheld the power of deportation without the protections of the criminal process. Justice Field's dissent quoted at length from Madison's Report.<sup>182</sup> The majority, in turn, invoked Vattel and later writers to show that every nation had the power to expel aliens.<sup>183</sup> Nonetheless, the majority agreed that aliens within the territory were subject to the laws,<sup>184</sup> and insisted that it was expounding, not denying, the constitutional rights of aliens.<sup>185</sup> Thus, the right/privilege argument of the moderate Federalists such as John Marshall and Henry Lee<sup>186</sup> became part of American constitutional law concerning immigration. It has persisted to this day, making deportation an anomalous exception to the general recognition of aliens' constitutional rights within United States territory.<sup>187</sup>

The Court kept its promise three years later by unanimously striking down a congressional act that, without indictment or trial by jury, subjected Chinese unlawfully within the country to one year's imprisonment at hard labor before their deportation:

Applying this reasoning to the Fifth and Sixth Amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law.<sup>188</sup>

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181. 149 U.S. 698 (1893).

182. See *id.* at 748-50 (Field, J., dissenting); *id.* at 740-41 (Brewer, J., dissenting). See also the earlier invocations of Madison's Report in *Chae Chan Ping v. United States*, 130 U.S. 581, 583 (1889) (argument of counsel); *Passenger Cases*, 48 U.S. (7 How.) 283, 513-14 (1849) (Daniel, J., dissenting); *id.* at 527 (Woodbury, J., dissenting), and Senator Walker's reliance on Madison's Report in the debates on the 1842 habeas corpus act, Act of Aug. 29, 1842, ch. 257, 5 Stat. 539, which authorized federal courts to intervene in state court prosecution of nonresident aliens for actions taken under color of authority of a foreign government. CONG. GLOBE, 27th Cong., 2d Sess. App. 613, 616 (1842).

183. 149 U.S. at 707-09 (citing, *inter alia*, Vattel). The majority also invoked John Marshall's defense of executive extradition in the Jonathan Robbins affair to demonstrate the inapplicability of criminal procedure to deportation. *Id.* at 714; see *supra* note 159.

184. 149 U.S. at 724 (citing, *inter alia*, Vattel).

185. *Id.* at 724-25.

186. See *supra* text accompanying notes 111-12.

187. See, e.g., Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862 (1989).

188. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *id.* at 242-43 (Field, J., concurring in part) ("He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws. . . . The contention that persons within the territorial jurisdiction of this republic might be beyond the protection of the law was heard with pain on the argument at the bar . . .").

Thus the Court held even Congress to the municipal law approach, and confirmed that nonmembership in the social contract does not deprive individuals present within the United States and subject to its laws of the concomitant right to the protection of the fundamental law of the land.

### III. INVOLVING PLACES

*The others also had wronged the Z'zus, to begin with, by calling them "immigrants," on the pretext that, since the others had been there first, the Z'zus had come later. This was mere unfounded prejudice—that seems obvious to me—because neither before nor after existed, nor any place to immigrate from, but there were those who insisted that the concept of "immigrant" could be understood in the abstract, outside of space and time.*<sup>189</sup>

The contrast between membership and municipal law approaches to the constitutional rights of aliens within American territory has been mirrored by opposing approaches to identifying the territory where constitutional rights apply. The question of the Constitution's geographical scope has involved two issues: the applicability of constitutional limitations to government action within the territory of a foreign sovereign or on the high seas, and their applicability to government action within territory of the United States that has not been admitted to statehood. In a debate that still continues,<sup>190</sup> United States territories have been assimilated to both extremes—as firmly within the Constitution's reach as any state, and as far beyond it as England or Japan.<sup>191</sup>

Throughout most of American history, these issues arose primarily within the context of expansion of the national territory. As the United States grew beyond the original thirteen states, and turned from the framework of self-government to a framework for governing others, the implications of distributing rights became more complex. Aside from the original sin against Native Americans, the United States did not generally rely on permanent caste distinctions to prevent linking constitutional rights of citizens of the states who travelled or migrated to the territories and those of the preexisting population they encountered there. The "extension" or "nonextension" of constitutional rights to new territory affected both state citizens and indigenous residents. Doubts about the "fitness" of newly acquired French, Spanish, Mexican, Hawaiian, Puerto Rican and Filipino subjects therefore conflicted with self-interest in a debate over localizing the Constitution.

The two most common approaches to the Constitution's coverage rested on an expansive use of the municipal law approach and a restrictive approach

189. I. CALVINO, *COSMICOMICS* 44 (W. Weaver trans. 1968).

190. See, e.g., *Torres v. Puerto Rico*, 442 U.S. 465 (1979); J. TORRUELLA, *supra* note 8.

191. Ironically, an American citizen's right to jury trial may be more firmly protected on foreign soil than in a territory of the United States. See *Reid v. Covert*, 354 U.S. 1 (1957).

relying on a heightened form of membership requirement. The municipal law analysis indicated that acquisition of sovereignty over a territory was sufficient to extend the fundamental law there. In the turn-of-the-century phrase, constitutional rights "followed the flag." In contrast, the membership approach to geographical scope personified sectors of the globe, and extended constitutional rights to new sectors only with the consent of certain of the prior sectors. Citizens who moved to the wrong sector would find that they had alienated their rights. One extreme form of this approach conceived of the Constitution as created by the states and for the states. This version preserved the mutual character of consent, since admission to statehood occurred at the request of a new state with the consent of the old. In contrast, less extreme versions of the membership approach affording some territories the benefits of membership made the consent one-sided, since the consent of the territories was not sought.

The municipal law approach dominated in the courts in the nineteenth century, but faced a resurgence of its membership rival in the wake of overseas expansionism at the turn of the century. Membership theories facilitated colonialism. Developments since that time have produced a mosaic of inconsistent rules and rationales rather than a true synthesis, and both membership and municipal law remain available resources of constitutional argument.

#### A. *The Constitution and the Territories in the Era of Continental Expansion*

The seeds of continuing disagreement were sown in 1787, when the political leaders of the new nation took two steps visibly in tension with their republican principles. First, in drafting the Constitution, they granted Congress full legislative power over the District of Columbia.<sup>192</sup> Second, in July of 1787, the Congress of the Confederation adopted the Northwest Ordinance, a framework for governing the territory north of the Ohio River ceded to Congress by the states. The Ordinance contemplated an initial stage of territorial existence in which the population would have no power of self-government.<sup>193</sup> Repeatedly during the next century, advocates would draw paradoxical conclusions from these denials of representation: they would reverse the logic of republicanism in order to claim that regions excluded from political participation were necessarily excluded from the scope of the Constitution altogether.

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192. U.S. CONST. art. I, § 8. The district chosen as the "Seat of Government" would not be within a state and would therefore have no voice in choosing the legislators exercising that power. In *The Federalist No. 43*, however, Madison predicted that "a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them."

193. See generally THE AMERICAN TERRITORIAL SYSTEM (J. Bloom ed. 1973); J. EBLEN, THE FIRST AND SECOND UNITED STATES EMPIRES: GOVERNORS AND TERRITORIAL GOVERNMENT, 1784-1912 (1968); LAWS OF ILLINOIS TERRITORY 1809-1818 (F. Philbrick ed. 1950); J. SMURR, TERRITORIAL JURISPRUDENCE (1970). The Constitution's only mention of the territory was the ambiguous provision in Article IV, section 3, granting Congress "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."

These themes may already be detected in the surviving documentation of the controversy resulting from the first great territorial expansion—the acquisition of Louisiana.<sup>194</sup> This “magnificent purchase”<sup>195</sup> redefined the United States, and compromised many of the principles that Jefferson thought had been vindicated in the election of 1800. Jefferson and his advisers stifled their doubts about the constitutional authority of the national government to acquire foreign territory, and to admit new states into the Union from later-acquired territory, as the treaty with France seemed to require.<sup>196</sup> The latter problem especially provoked the Federalist opposition, which insisted that the states’ ratification of the Constitution authorized Congress to admit new states-parties to the constitutional compact only from the territory then existing.<sup>197</sup> Some invoked the Preamble as evidence that the Constitution was designed only for the territory held or claimed by the original thirteen states.<sup>198</sup>

From their assumptions regarding the social contract, most of these Federalists argued towards a restrictive conclusion concerning the rights of the inhabitants.<sup>199</sup> The Constitution did not contemplate the incorporation of the territory as a state, and therefore Congress was entitled to govern it as a colonial dependency.<sup>200</sup> Some Republicans adopted the Federalist conclusion that, as a ceded country, Louisiana was subject only to the discretion of Congress;<sup>201</sup> a majority of the Republicans compromised their principles sufficiently to assure Jefferson the broad powers he desired for himself and his territorial governor.<sup>202</sup> A few of the dissenting Republicans expressly founded their constitutional objections on a municipal law approach, insisting that Congress

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194. Only partial reports of the debates on the ratification and initial implementation of the Louisiana treaty survive. See 13 ANNALS OF CONG., *passim* (1804); W. PLUMER, MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE, 1803-1807 (E. Brown ed. 1923); E. BROWN, CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE, 1803-1812 (1920).

195. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 587 (1823) (Marshall, C.J., no doubt savoring the irony).

196. 1 C. ADAMS, MEMOIRS OF JOHN QUINCY ADAMS 267 (1874) (conversation with Madison); E. BROWN, *supra* note 194, at 22-29; D. MALONE, JEFFERSON THE PRESIDENT: FIRST TERM, 1801-1805, at 311-21 (1970).

197. See 13 ANNALS OF CONG. 45 (1804) (remarks of Sen. Pickering); *id.* at 56 (remarks of Sen. Tracy); *id.* at 433 (remarks of Rep. G. Griswold); *id.* at 454-55 (remarks of Rep. Thatcher); *id.* at 461-62 (remarks of Rep. R. Griswold); W. PLUMER, *supra* note 194, at 7-9 (remarks of Sen. Plumer).

198. 13 ANNALS OF CONG. 461-62 (1804) (remarks of Rep. R. Griswold); W. PLUMER, *supra* note 194, at 7 (remarks of Sen. Plumer).

199. Only John Quincy Adams followed a consistent natural law view, insisting that the consent of the people of Louisiana to the change in government was required, and urging self-government for the territory. See 13 ANNALS OF CONG. 66-67 (1804); 1 C. ADAMS, *supra* note 196, at 267-68, 288-90; W. PLUMER, *supra* note 194, at 103-04, 143-46; see also *supra* text accompanying notes 87-90.

200. 13 ANNALS OF CONG. 45 (1804) (remarks of Sen. Pickering); W. PLUMER, *supra* note 194, at 12 (remarks of Sen. Plumer); *id.* at 76 (remarks of Sen. White); *id.* at 107, 137 (remarks of Sen. Pickering); *id.* at 114 (remarks of Sen. Hillhouse).

201. 13 ANNALS OF CONG. 511-12 (1804) (remarks of Rep. Smilie); *id.* at 1058-59 (remarks of Rep. Eustis); see also *id.* at 513-14 (remarks of Rep. Rodney, distinguishing between states and territories).

202. See E. BROWN, *supra* note 194, at 102-44; D. MALONE, *supra* note 196, at 348-50; Scanlon, *A Sudden Conceit: Jefferson and the Louisiana Government Bill of 1804*, 9 LA. HIST. 139 (1968).

could not acquire legislative power over the territory without being bound there by constitutional prohibitions.<sup>203</sup>

The Louisiana debates seem to resolve nothing, although they did set a precedent for expediency in the initial stages of territorial governance. These issues not only recurred in the course of routine administration of justice, but became questions of great political moment when the constitutional status of the territories seemed likely to determine the fate of slavery, and therefore of the nation.

### 1. *Marshall and Calhoun: Unlikely Allies*

We have already seen how Chief Justice John Marshall's nationalist vision of the Constitution as judicially enforceable law strengthened the municipal law approach and benefited the position of aliens. His stance similarly favored the District and the territories. Unexpectedly, Marshall's nationalist approach aligned with differently motivated arguments of John C. Calhoun and Roger Taney, leading to a dominance of the municipal law approach in the nineteenth century.

Although Marshall gladly passed up the Court's first opportunity to decide whether constitutional limitations constrained Congress in the District of Columbia,<sup>204</sup> he returned to this issue in 1820 in *Loughborough v. Blake*,<sup>205</sup> a case challenging Congress's power to impose a direct tax on the District of Columbia. Marshall found the requisite power in the first clause of Article I, section 8,<sup>206</sup> which authorizes Congress to collect "Taxes, Duties, Imposts and Excises," but requires the last three to be "uniform throughout the United States."

He went on to ask:

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203. 13 ANNALS OF CONG. 1129 (1804) (remarks of Rep. G.W. Campbell); *id.* at 510-11 (remarks of Rep. Jackson); W. PLUMER, *supra* note 194, at 136 (remarks of Sen. Anderson).

204. *United States v. More*, 7 U.S. (3 Cranch) 159 (1805). In an odd sequel to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the circuit court dismissed an indictment against a Federalist justice of the peace for the District of Columbia for levying fees that had been abolished by the new Republican Congress. The circuit court held that the diminution of the judge's revenues violated Article III. The prosecution claimed that the Constitution was inapplicable in the District: "The constitution is a compact between the people of the United States in their individual capacity, and the states in their political capacity. Unfortunately for the citizens of Columbia, they are not in either of these capacities." 7 U.S. (3 Cranch) at 167. The case was argued in the Supreme Court in February 1805, in the midst of the impeachment trial of Justice Samuel Chase. Chief Justice Marshall, however, managed once more to avoid resolving the constitutionality of Jefferson's judiciary policy by finding a dispositive jurisdictional issue. *Id.* at 173.

205. 18 U.S. (5 Wheat.) 317 (1820). The arguments are not reported and can only be inferred from Marshall's opinion.

206. *Id.* at 318. Marshall rejected the claim that the "great principle" of no taxation without representation deprived Congress of the power to tax the District of Columbia. *Id.* at 324. He admitted that "in theory it might be more congenial to the spirit of our institutions to admit a representative from the district," but the Constitution clearly did not authorize such a representative. *Id.* at 324-25.

Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of States and territories. The district of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania; and it is not less necessary, on the principles of our constitution, that uniformity in the imposition of imposts, duties and excises, should be observed in the one, than in the other.<sup>207</sup>

Somewhat overconfidently, this passage expresses Marshall's theme of national unification, and echoes a sentence of the previous year in *McCulloch v. Maryland*.<sup>208</sup> In that opinion, Marshall had insisted on considering the Constitution as "emanating from the people, [and not] as the act of sovereign and independent states."<sup>209</sup> But by 1820, the rancor of sectional division had made itself manifest in the debates leading to the Missouri Compromise, and the limits of congressional power over the territories were becoming a hotly disputed issue.<sup>210</sup>

Marshall directly addressed the Constitution's force in a territory in the well-known but perplexing case of *American Insurance Co. v. Canter*.<sup>211</sup> The insurance company attacked a judgment of a court, created by the Florida territorial legislature, that purported to exercise admiralty jurisdiction. The insurance company argued that the territory of Florida lacked the power to vest jurisdiction in the court, because admiralty jurisdiction is reserved to federal courts under Article III.<sup>212</sup> On circuit, Justice Johnson rejected this claim, finding that the allocation of jurisdiction to federal courts under Article III was inapplicable because Florida was an after-acquired territory. He maintained that the Constitution did not apply to Florida, and that Congress was bound only by the law of nations in governing it.<sup>213</sup> In the Supreme Court, Canter's attorneys reiterated this membership approach, insisting on the phrasing of the Preamble: "The constitution was established by the people of the United States,

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207. *Id.* at 319. Direct taxes, however, were to be apportioned by a different rule, which, after some textual straining, Marshall construed as flexible enough to permit Congress to include or exclude, at its option, the District and territories in direct taxation. *Id.* at 319-24.

208. 17 U.S. (4 Wheat.) 316, 408 (1819) ("Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported."); see also Marshall, *A Friend of the Constitution No. 4*, in DEFENSE OF MCCULLOCH, *supra* note 162, at 185.

209. *McCulloch*, 17 U.S. (4 Wheat), at 402-05; see G.E. WHITE, *supra* note 166, at 485-87, 544-45; *A Friend of the Constitution, Nos. 6 & 8*, in DEFENSE OF MCCULLOCH, *supra* note 162.

210. See, e.g., D. FEHRENBACHER, *supra* note 172, at 100-13; W. WIECEK, THE SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 114-16 (1977); see also *infra* text accompanying note 243 (noting Daniel Webster's early involvement in this debate).

211. 26 U.S. (1 Pet.) 511 (1828).

212. *Id.* at 546.

213. *Id.* at 515-22. Johnson's opinion is set out as a footnote to the case.

for the United States."<sup>214</sup> Florida was not one of those states. "If the constitution is in force in Florida, why is [Florida] not represented in Congress?"<sup>215</sup>

These arguments forced Marshall to address questions of acquisition and governance of territory. In reply, Marshall asserted that (in accordance with the usage of nations) once a territory is ceded to another nation, the political laws that govern the relationship between the inhabitants and their sovereign necessarily change.<sup>216</sup> The treaty of cession covering Florida stipulated that its inhabitants be "admitted to the enjoyment of the privileges, rights and immunities of the citizens of the United States."<sup>217</sup> Therefore, "[i]t is unnecessary to inquire whether this is not their condition independent of stipulation. They do not, however, participate in political power; they do not share in government, till Florida shall become a state."<sup>218</sup> Thus, Marshall rejected once more the fallacy that constitutional limitations can attach only upon admission to the Union as a self-governing state, although he left ambiguous what would have happened absent the treaty.

Turning to the particular constitutional issue at hand, Marshall held that the power to govern the territories, whether implied from the war power and the treaty power or expressly granted by Article IV, gave Congress the authority to establish courts in addition to those contemplated by Article III of the Constitution, and to vest them with admiralty jurisdiction.<sup>219</sup> *Canter* therefore prevailed, though not on the broadest grounds that his counsel advanced. The Constitution *was* in force in Florida.

By the late 1820's, John C. Calhoun's conception of the nature of the Union was diametrically opposed to Marshall's,<sup>220</sup> and yet he reached similar conclu-

214. *Id.* at 533.

215. *Id.* (argument of Whipple). Daniel Webster also argued on *Canter's* behalf, to similar effect; I shall discuss his argument later. See *infra* text accompanying notes 244-46.

216. *Canter*, 26 U.S. (1 Pet.) at 542; see also *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 225 (1845) ("Every nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own government, and not according to those of the government ceding it.") (citing *Vattel*); *Chicago, R.I. & P.R.R. v. McGlinn*, 114 U.S. 542, 546 (1885) (Field, J.) ("As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced.").

217. *Canter*, 26 U.S. (1 Pet.) at 542.

218. *Id.*

219. "In legislating for [the territories], congress exercises the combined powers of the general, and of a state government." *Id.* at 546. Marshall may have disserved the cause of civil liberties in the territories by legitimating the creation of courts with judges lacking Article III tenure protections. See *McAllister v. United States*, 141 U.S. 174, 193-95 (1891) (Field, J., dissenting); *Palmore v. United States*, 411 U.S. 389, 410-22 (1973) (Douglas, J., dissenting). But this issue was not directly before him; the American Insurance Company had not complained about the tenure of judges in the territorial court, but had argued that the Florida legislature lacked the power to create a court with admiralty jurisdiction at all. As Marshall had previously recognized, however, there was a need for courts in the territories beyond those described in Article III, because Article III created only courts of limited jurisdiction. See *Serè v. Pitot*, 10 U.S. (6 Cranch) 332, 336-38 (1810). Marshall aggravated this need by holding that citizens of the District and the territories were not citizens of a state for diversity purposes. *Corporation of New-Orleans v. Winter*, 14 U.S. (1 Wheat.) 91 (1816); *Hepburn v. Ellzey*, 6 U.S. (2 Cranch) 445, 452-53 (1805).

220. See generally F. BANCROFT, CALHOUN AND THE SOUTH CAROLINA NULLIFICATION MOVEMENT (1928); W. FREEHLING, PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA



sions regarding the extension of the Constitution to the District and the territories, conclusions that were ultimately affirmed by the Taney Court in the 1850's.<sup>221</sup> In the wake of the so-called Tariff of Abominations of 1828, Calhoun was asked to draft an essay to guide the South Carolina legislature in responding to the tariff.<sup>222</sup> After study of the prior states' rights literature, including the Virginia and Kentucky Resolutions and Madison's Report, he produced the *South Carolina Exposition and Protest* on nullification.<sup>223</sup> Once the nullification crisis had passed, Calhoun developed his theories further, for the purpose of denying congressional power over slavery in the District of Columbia and the territories. He developed two arguments that enabled him to reach this conclusion. One subjected the federal government to implied constitutional obligations as agent or trustee for the sovereign states. The other treated express provisions of the Constitution as directly applicable in the District and the territories.

Calhoun rejected the natural rights tradition from which the abolitionists drew their arguments,<sup>224</sup> as well as the idea of a state of nature or an original social contract subjecting a people to government.<sup>225</sup> According to Calhoun, government was a social institution that arose naturally. Constitutions were artificial contrivances adopted by a people for the purpose of governing their government.<sup>226</sup> This was true of both the state and federal constitutions.<sup>227</sup> He viewed the United States Constitution in particular as a "written, positive compact,"<sup>228</sup> embodying a contract or treaty among previously existing sovereign states; that is, among the peoples of the several states as distinct political

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1816-1836 (1968); J. NIVEN, JOHN C. CALHOUN AND THE PRICE OF UNION 134-78 (1988); M. PETERSON, THE GREAT TRIUMVIRATE: WEBSTER, CLAY, AND CALHOUN 168-69 (1987); Capers, *A Reconsideration of John C. Calhoun's Transition from Nationalism to Nullification*, in JOHN C. CALHOUN: A PROFILE 74 (J. Thomas ed. 1968); see also D. FEHRENBACHER, *supra* note 172, at 139 (on timing of Calhoun's evolution).

221. See *infra* text accompanying notes 253-67.

222. W. FREEHLING, *supra* note 220, at 158; 10 CALHOUN PAPERS, *supra* note 100, at 431-33 (Letter to William C. Preston).

223. 10 CALHOUN PAPERS, *supra* note 100, at 442; see J. NIVEN, *supra* note 220, at 136-37, 158-59. Like Jefferson, he concealed his authorship of this attack on the government in which he was serving as Vice President at the time.

224. *A Disquisition on Government*, in 1 CALHOUN WORKS, *supra* note 100, at 58-59 [hereinafter *Disquisition*]. Not surprisingly, this was typical of the proslavery theorists. See D. FAUST, THE IDEOLOGY OF SLAVERY: PROSLAVERY THOUGHT IN THE ANTEBELLUM SOUTH, 1830-1860, at 8-9, 12 (1981); W. FREEHLING, *supra* note 220, at 328-33.

Calhoun's fullest elaboration of his views appeared in the posthumously published *Disquisition* and *A Discourse on the Constitution and Government of the United States*, in 1 CALHOUN WORKS, *supra* note 100, at 109 [hereinafter *Discourse*]. On their composition, see J. NIVEN, *supra* note 220, at 328-29, 333-37; M. PETERSON, *supra* note 220, at 409. The major elements of the argument are also contained in his Senate speeches and addresses at various stages of the abolition controversy.

225. *Disquisition*, *supra* note 224, at 58; A. SPAIN, THE POLITICAL THEORY OF JOHN C. CALHOUN 84-92, 172-73 (1951); McLaughlin, *Social Compact and Constitutional Construction*, 5 AM. HIST. REV. 467, 484-85 (1900).

226. *Disquisition*, *supra* note 224, at 7-8.

227. *Discourse*, *supra* note 224, at 111.

228. 4 CALHOUN WORKS, *supra* note 100, at 80 (Senate speech of Feb. 28, 1842).

bodies, not merely among their respective governments.<sup>229</sup> This agreement formed them into a "federal" union, a hybrid form that was neither a nation nor a mere confederacy or league of separate states.<sup>230</sup> Calhoun purported to rely on positive historical evidence, including the published journals of the Convention and the ratification proceedings, to reconstruct the actual bargain that underlay the Constitution.<sup>231</sup> Not surprisingly, he found both explicit and structurally implied protections for Southern slavery, which he regarded as essential to the preservation of Southern institutions.

Unlike the Louisiana Territory, which included a port city with a substantial non-English colonial population, later territorial acquisitions on the continent involved underpopulated tracts considered ripe for settlement by citizens of existing states. This made it easy for both sides to view conditions in the territories as implicating the rights of citizens of the states.<sup>232</sup> It may also have made it easy for Calhoun to accept the extension of positive constitutional protections, the traditional rights of Englishmen, to the future territorial population. And Calhoun argued that such extension was expressly required by the supremacy clause.<sup>233</sup> Vis-à-vis the several states, the Constitution was a compact, but vis-à-vis the federal government it was a governing law. The supremacy clause made it clear that the Constitution was "the supreme law of the land," including "the *territorial possessions* of the United States; or, as far as their authority might otherwise extend."<sup>234</sup> Thus, beginning with a contractual theory of the Constitution as an agreement among the states for their own benefit, Calhoun deduced that constitutional prohibitions were positive legal norms geographically coextensive with the legislative powers of Congress.

## 2. Webster and the State Membership Counter-Tradition

The tradition restricting constitutional limitations to the states as members of the Union was most influentially articulated by Calhoun's great antagonist, Daniel Webster. Unlike Calhoun, Webster was not a systematic thinker—he was a lawyer, an orator, and a politician. Nonetheless, he was viewed as the

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229. *Discourse*, *supra* note 224, at 119, 131. This was the meaning of the Preamble's phraseology "We the People of the United States of America"—the "United States" were the "States united." Similarly, in declaring that the Constitution was "for the United States of America," they identified the intended beneficiaries as the peoples of the several states. *Id.* at 128-29, 132-34.

230. *Id.* at 112-13, 162-68; A. SPAIN, *supra* note 225, at 184-88; see also *Speech in Reply to Mr. Webster*, in 2 CALHOUN WORKS, *supra* note 100, at 262 (Feb. 26, 1833).

231. See, e.g., *The South Carolina Exposition and Protest*, in 10 CALHOUN PAPERS, *supra* note 100, at 446-47; *Discourse*, *supra* note 224, at 244-49, 256-57; 4 CALHOUN WORKS, *supra* note 100, at 353-54; see also Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 2 (1986) (describing publication history); Powell, *supra* note 100, at 945-46 (discussing increased use of original materials as states' rights controversy deepened).

232. See E. FONER, *FREE SOIL, FREE LABOR, FREE MEN* 54-58 (1970).

233. *Discourse*, *supra* note 224, at 256-57; 4 CALHOUN WORKS, *supra* note 100, at 536 (debate with Webster in the Senate, Feb. 24, 1849).

234. *Discourse*, *supra* note 224, at 256-57 (emphasis in original).

principal constitutional advocate of his day, and he often took up the gauntlet on behalf of New England and the Union. He agreed with Calhoun in viewing the Constitution in positivist terms and in reading it as a compromise with slavery. Political exigencies therefore pushed him to insist on a position he had developed in the course of his legal practice, that the Constitution was legally binding only within the boundaries of the states.

Webster's celebrity as a defender of the Union arose from two Senate speeches refuting Calhoun and the Nullifiers: his famous Reply to Hayne in 1830<sup>235</sup> and his response to Calhoun on the Force Bill in 1833.<sup>236</sup> He rejected the Nullifiers' view of the Constitution as an agreement among sovereign states, insisting that the national government was the creation of a single supreme power, the people of the United States.<sup>237</sup>

[T]he Constitution of the United States, founded in or on the consent of the people, may be said to rest on compact or consent; but it is not itself the compact, but its result.<sup>238</sup>

This consent of the people has been called, by European writers, the social compact; and, in conformity to this common mode of expression, these conventions speak of that assent, on which the new Constitution was to rest, as an explicit and solemn compact, not which the States had entered into with each other, but which the people of the United States had entered into.<sup>239</sup>

The Constitution was "not a league, compact, or confederacy, but a fundamental law."<sup>240</sup> The people had made the Constitution a supreme law and had created a national judiciary to resolve disputes about its meaning.<sup>241</sup> Webster thus reformulated the nature of the Union in terms derived from Marshall Court cases, some of which Webster had argued himself.<sup>242</sup>

Despite Webster's nationalism and his insistence on the Constitution as a fundamental law, he viewed the Constitution's geographical scope as narrower than the American nation. Webster had become involved in territorial questions back in 1819, joining the public debate on the Missouri Compromise.<sup>243</sup> As

235. 6 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 3 (1903) [hereinafter WEBSTER SPEECHES] (speech of Jan. 26-27, 1830). The Reply, actually the Second Reply, formed part of a running debate between the two in January 1830. CONG. DEB. 31-93 (1830).

236. 6 WEBSTER SPEECHES, *supra* note 235, at 181.

237. *Id.* at 54.

238. *Id.* at 201.

239. *Id.* at 210.

240. *Id.* at 198-99.

241. *Id.* at 67-68.

242. See R. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 222 (1984); M. PETERSON, *supra* note 220, at 177-88; G.E. WHITE, *supra* note 166, at 281-89, 491-93.

243. Webster served as chairman of the committee that produced the Boston *Memorial to Congress on restraining the Increase of Slavery*, Dec. 15, 1819, reprinted in 15 WEBSTER SPEECHES, *supra* note 235, at 55. See M. PETERSON, *supra* note 220, at 59-60. Whether Webster drafted the *Memorial* is disputed. See 15 WEBSTER SPEECHES, *supra* note 235, at 73. Be that as it may, the *Memorial* sets forth Webster's future

co-counsel on the prevailing side in *American Insurance Co. v. Canter*,<sup>244</sup> Webster argued that the Constitution had no application to an acquired territory. Like Justice Johnson on circuit, Webster derived the status of the American territories from general principles of public law, and not from American political theory.<sup>245</sup> He also employed the usual reverse-republican fallacy, arguing that since a territory lacked political rights, it must have no rights at all.<sup>246</sup> Although Webster won the case, he lost this part of the argument. Chief Justice Marshall held that the Constitution did extend to Florida, leaving open the question of what triggered the extension.<sup>247</sup>

Oddly, Webster seems never to have recognized that Marshall rejected his approach. He repeated the same arguments in his 1849 debate with Calhoun over territorial government in the region newly acquired from Mexico. Senator Isaac Walker of Wisconsin had offered an amendment that purported to "extend" the Constitution over the territory.<sup>248</sup> From the Calhounite perspective, the amendment would declare that the constitutional protection of slaveholders' "property" extended to the territories.<sup>249</sup> Webster denied not only that the Constitution applied to the territories of its own force, but even that it was possible to extend it to them.<sup>250</sup>

Webster's rhetorical position was quite peculiar. Other senators insisted that the Constitution, as "a compact and agreement between sovereign States," could not be "extended" except by admitting further states.<sup>251</sup> Webster's formulation was very close to this: though he insisted that the Constitution was not a compact but the *product* of a compact, he limited the protection of individual rights to those regions that exercised the sovereign political power of the national government. Surely this is a variant of the membership interpretation of the social contract. But Webster, having famously combatted the notion of the Constitution as a compact, avoided this terminology.

Despite its logical weaknesses, Webster's membership-in-the-Union approach was popular with those who opposed the spread of slavery but recognized the Constitution's accommodations to it.<sup>252</sup> Although the municipal law

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argument that Congress's power over the territories is legally unlimited and subject only to moral constraints. *Id.* at 56-57.

244. 26 U.S. (1 Pet.) 511 (1828); see *supra* text accompanying notes 211-19.

245. See *supra* text accompanying notes 214-15.

246. 26 U.S. (1 Pet.) at 538 (Webster's argument). Marshall, of course, had already rejected this approach in *Loughborough v. Blake*, 18 U.S. (5 Wheat) 317 (1820). See *supra* text accompanying notes 205-07.

247. See *supra* notes 216-18 and accompanying text.

248. See CONG. GLOBE, 30th Cong., 2d Sess. App. 255 (1849); D. FEHRENBACHER, *supra* note 172, at 155-57; M. PETERSON, *supra* note 220, at 448-49.

249. See CONG. GLOBE 30th Cong. 2d Sess. App. 273 (1849) (remarks of Sen. Calhoun); cf. *id.* at 267 (remarks of Sen. Walker) ("If the Constitution will extend slavery to the land, then let it go. If by that Constitution slavery is extended, I am willing to stand by that Constitution.").

250. *Id.* at 273. Webster even cited the *Canter* case as if it supported his position.

251. *Id.* at 257, 262, 268 (remarks of Sen. Dayton); *id.* at 270 (remarks of Sen. Hale).

252. See *id.*; *infra* note 268.

approach gained wider currency in the courts and the Calhounites won a Pyrrhic victory in the Dred Scott decision, the association of the opposite view with the prestigious Webster helped lay the foundation for a partial retreat in the *Insular Cases*.

### 3. *A Continental Equilibrium*

The Taney Court finally attempted to eliminate uncertainty about the status of the territories. The territorial courts had dealt as best they could with these issues for the first half of the nineteenth century.<sup>253</sup> They received more explicit guidance from a series of Supreme Court cases reflecting the municipal law approach in the 1850's, establishing an equilibrium that held for as long as the United States' manifest destiny was limited to the North American continent.

Some of these decisions directly involved the fatal issue of slavery, while others implicated it only indirectly.<sup>254</sup> For example, in *Webster v. Reid*,<sup>255</sup> the Court relied evenhandedly on the Seventh Amendment and the Iowa Territory organic statute to vindicate the right to civil jury trial against a special act of the territorial legislature.<sup>256</sup> In *United States v. Dawson*,<sup>257</sup> the Court held that Article III, section 2, rather than the Sixth Amendment, dictated the constitutional venue requirements for crimes committed in the "Indian country."

If any doubts remained about whether the Court would apply the Constitution to the territories, Justice Taney sought to dispel them in *Scott v. Sandford*.<sup>258</sup> He argued that Congress was subject to both implied and express

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253. See, e.g., *United States v. Minnesota & N.W.R.R. Co.*, 1 Minn. 127 (Minn. Terr. 1854) (invalidating act of Congress on takings grounds), *rev'd sub nom.* *Rice v. Railroad Co.*, 66 U.S. (1 Black) 358 (1862); *Ponder v. Graham*, 4 Fla. 23, 43-46 (1851) (invalidating divorce granted by territorial legislature); *Rogers v. Bradford*, 1 Pin. 418, 427-28 (Wis. Terr. 1844) (territorial court is not a "Court of the United States" within the meaning of the Seventh Amendment, purporting to follow *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828)); *Doty v. Strong*, 1 Pin. 84, 88 (Wis. Terr. 1840) (territorial delegate shares constitutional privilege from arrest under Article I); *Territory v. Hattick*, 2 Mart. (O.S.) 87 (Orleans Terr. Super. Ct. 1811) (criminal jury trial provisions apply only to crimes against the United States); see generally J. SMURR, *supra* note 193.

254. See *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (denying congressional power over slavery in territories); *Cross v. Harrison*, 57 U.S. (16 How.) 164 (1854) (sorting out customs consequences of acquisition of California); *United States v. Dawson*, 56 U.S. (15 How.) 467 (1854) (discussing constitutional venue requirements in Indian country); *Webster v. Reid*, 52 U.S. (11 How.) 437 (1851) (requiring civil jury trial in Iowa Territory); *Strader v. Graham*, 51 U.S. (10 How.) 82 (1851) (discussing effect of Northwest Ordinance on slavery); see also *Fleming v. Page*, 50 U.S. (9 How.) 603 (1850) (discussing customs consequences of occupation of Mexican soil).

255. 52 U.S. (11 How.) 437 (1851).

256. It must be recognized there are serious ambiguities in referring to the "constitutionality" of an act of a territorial legislature, and that the strongest evidence of an "extension" of the Constitution to a territory would be the invalidation of an Act of Congress, as in the Dred Scott decision.

257. 56 U.S. (15 How.) 467 (1854).

258. 60 U.S. (19 How.) 393 (1857).

constitutional limitations in legislating for the territories.<sup>259</sup> Taney insisted that property rights in slaves were protected in the territories by the due process clause of the Fifth Amendment.<sup>260</sup> He disposed of contrary arguments from natural or international law by insisting on the terms of the Constitution as he understood them, "positive and practical regulations plainly written down."<sup>261</sup> Taney's logic followed Calhoun's:

[The protection of persons and property under the Constitution] is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under Territorial Government, as well as that covered by the States. It is a total absence of power everywhere within the dominion of the United States, and places the citizens of a Territory, so far as these rights are concerned, on the same footing with the citizens of the States, and guards them as firmly and plainly against any inroads which the General Government might attempt, under the plea of implied or incidental powers.<sup>262</sup>

None of the Justices indicated any disagreement with Taney's statement that the Constitution in general, and the Bill of Rights in particular, bound Congress in the territories.<sup>263</sup> The dissenters agreed explicitly. Justice McLean, who was himself holding in reserve an implied limitation *against* expansion of slavery,<sup>264</sup> asserted that "the Constitution was formed for our whole country. An expansion or contraction of our territory required no change in the fundamental law."<sup>265</sup> Justice Curtis' celebrated dissent agreed that positive limitations expressed in the text applied to the territories,<sup>266</sup> and met Justice Taney on the merits of the due process argument, concluding that due process could not be understood as requiring maintenance of slavery.<sup>267</sup>

The taint of the Dred Scott decision did not cause judicial reaction against

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259. Tracing the power to acquire and govern territory to the express power to admit new states, Taney concluded that Congress could not treat citizens in the territories as mere colonists, or rule permanent colonial dependencies without restrictions—a neat reversal of the Federalist argument concerning Louisiana. *Id.* at 451-52. In the spirit of Calhoun's trusteeship argument, he also inferred an implied limitation against preventing slaveholders from migrating with their "property" to any territory. *Id.* at 450-51.

260. *Id.* at 450.

261. *Id.* at 451.

262. *Id.* at 450-51.

263. See Corwin, *The Dred Scott Decision, in the Light of Contemporary Legal Doctrines*, 17 AM. HIST. REV. 52, 59 (1911). It is notorious that only Justice Wayne concurred in all of Taney's opinion, although Taney had it denominated the Opinion of the Court. See, e.g., D. FEHRENBACHER, *supra* note 172, at 389.

264. See 60 U.S. (19 How.) at 542. McLean, the strongest antislavery Justice of the period, adopted a version of the moderate antislavery position that, though the Constitution shielded slavery in the states, it did not grant Congress the power to establish slavery in the territories. See *Miller v. McQuerry*, 17 F. Cas. 335, 336-37 (C.C.D. Ohio 1853) (No. 9,583); D. FEHRENBACHER, *supra* note 172, at 143; F. WEISENBURGER, *THE LIFE OF JOHN MCLEAN: A POLITICIAN ON THE UNITED STATES SUPREME COURT* 118, 123, 137, 140-41, 147-49, 189-91 (1937).

265. 60 U.S. (19 How.) at 544.

266. *Id.* at 614.

267. *Id.* at 624-27.

the municipal law approach.<sup>268</sup> In the midst of the Civil War, the Supreme Court of Washington Territory proudly declared:

The Constitution of the United States is co-extensive with the vast empire that has grown up under it, and its provisions securing certain rights to the accused in criminal cases, are as living and potent on the shores of the Pacific as in the city of its birth.<sup>269</sup>

During that same period, the Supreme Court was unanimous in assuming that an act of Congress retracting a vested right to tracts of land in a territory would be void.<sup>270</sup> Referring to both the Constitution and the laws extending it, the post-Civil War Court also scrutinized a variety of claims under the Bill of Rights, including cruel and unusual punishment<sup>271</sup> and right to jury trial.<sup>272</sup>

The strength of the late nineteenth-century settlement of the geographical issue may be seen in the Court's observance of it through most of the next great political controversy regarding the territories, the battle against polygamists in the Church of Jesus Christ of Latter-day Saints in Utah.<sup>273</sup> Through most of this struggle, Congress conceded that the Constitution generally, and the First Amendment in particular, were binding in the Utah Territory.<sup>274</sup> The Supreme Court's seminal decision in *Reynolds v. United States*<sup>275</sup> involved the Sixth Amendment rights to an impartial jury and to confrontation,<sup>276</sup> in

268. Not all of Taney's numerous critics limited themselves to McLean and Curtis's grounds of disagreement. The dying Thomas Hart Benton issued a little book that had some influence later, in which he agreed with Webster that the Constitution protected only the states, and that Congress had absolute power over the territories. T. BENTON, *HISTORICAL AND LEGAL EXAMINATION OF THAT PART OF THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN THE DRED SCOTT CASE, WHICH DECLARES THE UNCONSTITUTIONALITY OF THE MISSOURI COMPROMISE ACT, AND THE SELF-EXTENSION OF THE CONSTITUTION TO THE TERRITORIES, CARRYING SLAVERY ALONG WITH IT* (1857, reprint 1970); see Downes v. Bidwell, 182 U.S. 244, 275 (1901) (opinion of Brown, J.) (invoking Benton's authority); D. FEHRENBACHER, *supra* note 172, at 631 nn. 54, 56; Corwin, *supra* note 263, at 59.

269. *Elick v. Washington Territory*, 1 Wash. Terr. 136, 140 (1861).

270. *Rice v. Railroad Co.*, 66 U.S. (1 Black) 358 (1862).

271. *Wilkerson v. Utah*, 99 U.S. 130 (1878).

272. *Kennon v. Gilmer*, 131 U.S. 22 (1889); *Reynolds v. United States*, 98 U.S. 145 (1878). In an odd pair of cases in 1897, the Court expressed uncertainty as to whether the Seventh Amendment applied of its own force in a territory, and then two weeks later insisted that it did. See *Springville v. Thomas*, 166 U.S. 707, 708-09 (1897); *American Publishing Co. v. Fisher*, 166 U.S. 464, 466 (1897).

273. See E. FIRMAGE & R. MANGRUM, *ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830-1900* (1988); Davis, *The Polygamous Prelude*, 6 AM. J. LEG. HIST. 1 (1962); Linford, *The Mormons and the Law: The Polygamy Cases* (Parts 1 & 2), 9 UTAH L. REV. 308, 543 (1964-1965).

274. See, e.g., H.R. REP. NO. 2735, 49th Cong., 1st Sess. 7-9 (1886); H.R. REP. NO. 83, 36th Cong., 1st Sess. 2-4 (1860); E. FIRMAGE & R. MANGRUM, *supra* note 273, at 134-35. There were lapses, however, as in 1882 when a Florida Senator invoked Webster's argument that "the Congress of the United States in legislating for the Territories is not hampered by constitutional restrictions or limitations; that the Preamble of the Constitution tells us it was made for States and not for Territories." 13 CONG. REC. 1206 (1882) (remarks of Sen. Jones); see also *id.* at 1162.

275. 98 U.S. 145 (1879).

276. One of Reynolds' wives testified at an earlier trial, but could not be found for the later one. Her prior testimony was admitted. See *id.* at 158-61. Only Justice Field dissented, and only on this issue. See *id.* at 168.

addition to the crucial First Amendment issue of polygamy as an exercise of religion. The importance of *Reynolds* in constitutional history lies precisely in its acceptance as precedent in free exercise cases generally, rather than as a special rule for territories. A later case, *Hans Nielsen, Petitioner*,<sup>277</sup> upheld a constitutional objection, this time to violation of the double jeopardy guarantee. Some ambiguity did return, however, in Justice Bradley's opinion for the majority in the climactic decision upholding Congress's dissolution of the Church corporation and forfeiture of its assets.<sup>278</sup>

A year later, Justice Field placed the capstone on the municipal law edifice in *In re Ross*,<sup>279</sup> a decision relying on the restriction of constitutional protection to the territory held by the United States as sovereign. The case involved an American seaman tried before an American consul for murder committed aboard an American ship in a Japanese harbor, pursuant to Japan's grant of rights of extraterritoriality to American nationals.<sup>280</sup> Ross claimed that trial in the "consular court" denied him his constitutional rights to grand jury indictment and trial by jury. A unanimous court relied on both practical and theoretical reasons in rejecting this claim.<sup>281</sup> Field, who believed strongly in the territorial character of law,<sup>282</sup> characterized the Constitution's scope as follows:

By the Constitution a government is ordained and established "for the United States of America," and not for countries outside of their limits. The guarantees it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offences committed elsewhere, and not to residents or temporary sojourners abroad. The Constitution can have no operation

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277. 131 U.S. 176 (1889) (overturning conviction of a husband under the adultery provisions of the federal polygamy statute, after he had already been convicted for the same acts under the provisions forbidding polygamous cohabitation).

278. After a series of quotations of orthodox case law on the status of the territories, Bradley appended a dictum that would support much mischief in later years:

Doubtless Congress, in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions.

*The Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1, 44 (1890). Chief Justice Fuller, Justice Field, and Justice Lucius Q.C. Lamar filed an unhelpfully brief dissent.

279. 140 U.S. 453 (1891).

280. For a recent description of extraterritorial regimes, see Bederman, *Extraterritorial Domicile and the Constitution*, 28 VA. J. INT'L L. 451 (1988).

281. 140 U.S. at 464-65. Field mentioned the "impossibility of obtaining a competent grand or petit jury" in a foreign country, and pointed out that the citizen denied these protections was often "the gainer" from being spared subjection to a foreign legal system, which might even involve "extreme cruelty and torture." *Id.*; see also *Forbes v. Scannell*, 13 Cal. 243, 281-82 (1859) (Baldwin, J., joined by Field, J.).

282. See, e.g., *Pennoyer v. Neff*, 95 U.S. 714, 722-23 (1878); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180-82 (1868).



in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other.<sup>283</sup>

The language of the argument came from the conflict of laws and emphasized the primacy of territorial sovereignty as the basis of legal obligation. Japan as a sovereign nation had the ultimate right to forbid the consul to conduct a jury trial within its territory; therefore the Constitution was not legally binding on the consul.

Field's logic, of course, was slippery: our Constitution had no binding force on the government of Japan, but that does not mean that the United States government, in negotiating an extraterritoriality treaty with Japan, was free to negotiate for a system of trial that violated our Constitution. That the Constitution does not bind their government does not mean that it *cannot* bind ours, perhaps to inaction. Indeed, Field's opinion devoted more space to demonstrating that United States jurisdiction extended over Ross than to demonstrating that the United States Constitution did not extend over the consul.<sup>284</sup> Nonetheless, Field treated the Constitution as extending as far as the nation's power of legislation was plenary—to cases where it could govern by right, not by consent or comity.

### B. *We the People, Incorporated*

A second legacy of the Dred Scott decision ultimately produced a transformation in the terms of the debate over American constitutionalism. After the Civil War amendments, the Constitution was no longer committed to a conflict with natural law. Over the next few decades, "due process of law" became a rubric under which conservative economic interests persuaded the Justices to confer on themselves the power of enforcing natural law as positive law.<sup>285</sup> The resulting expansion of judicial discretion opened up new ground for compromise between full equality of constitutional rights and relegation to extralegal status—territories could be judicially shielded from absolute despotism without receiving all the rights of the metropolis.

At the same time, the United States' manifest destiny was shifting from the filling out of an underpopulated continent to imperialist competition with other

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283. 140 U.S. at 464 (citation omitted).

284. See *id.* at 470-80. The case was complicated by the fact that Ross was a British subject on an American vessel, and the British government had protested the trial, but the Court ruled that he was assimilated to the status of an American national during his service on the vessel.

285. Everyone knows this, but see, e.g., C. HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* 104-65 (1930); C. JACOBS, *LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW* (1954); G.E. WHITE, *THE AMERICAN JUDICIAL TRADITION* 95-108 (rev. ed. 1988); B. WRIGHT, *AMERICAN INTERPRETATIONS OF NATURAL LAW* 298-306 (1931).

great powers.<sup>286</sup> This meant acquiring more distant territory, some of it densely populated by peoples whom the expansionists were not prepared to regard as equals. As a result, the Supreme Court, though at first by a bare majority, chose to occupy this intermediate ground, reincarnating the geographically restrictive membership approach in the doctrine of "incorporated territories"<sup>287</sup> that originated in the *Insular Cases*.<sup>288</sup> The underlying theories were most cogently expressed in the opinions of Justices Edward Douglass White and John Marshall Harlan, respectively concurring and dissenting in *Downes v. Bidwell*. White's innovation maintained the Constitution as the measure of federal power over territories supposedly designated by Congress as welcome to full status, but limited protection in other territories to a minimal set of background rights described as fundamental. Harlan, in contrast, continued the traditional insistence that wherever Congress acquired sovereignty, the rights of the written Constitution followed as part of the fundamental law.

It is important to recognize that the *Insular Cases* were preceded by a decade of political controversy over imperialism and scholarly controversy over its constitutional implications.<sup>289</sup> The constitutional polemics began with the proposed annexation of Hawaii in 1893<sup>290</sup> and accelerated through the Spanish-American War and its aftermath, the appropriation of significant portions of Spain's overseas colonial empire.

Many of the authors combed history, including the antebellum debates on the Constitution in the territories, for support. Some took the traditional view that the Constitution constrains government action wherever the United States is sovereign,<sup>291</sup> while others invoked its ancient rival—the claim that the Con-

286. See, e.g., D. HEALY, *US EXPANSIONISM: THE IMPERIALIST URGE IN THE 1890S* (1970); E. MAY, *IMPERIAL DEMOCRACY: THE EMERGENCE OF AMERICA AS A GREAT POWER* (1961); E. TOMPKINS, *ANTI-IMPERIALISM IN THE UNITED STATES: THE GREAT DEBATE, 1890-1920* (1970).

287. For readers new to this material, it may be unfortunate that tradition has associated the word "incorporate" with both the applicability of the Bill of Rights to federal action in the territories and the applicability of the Bill of Rights to actions of the states. In the first case, the reference is to incorporating the territory into the United States, and in the second, to incorporating the Bill of Rights into the Fourteenth Amendment.

288. This imprecise term refers both to the nine cases relating to the constitutional and legal status of Puerto Rico and the Philippines argued in 1901 and to the entire series of cases from *DeLima v. Bidwell*, 182 U.S. 1 (1901), to *Balzac v. Porto Rico*, 258 U.S. 298 (1922), that established the framework of second-class status for overseas territories.

289. See generally R. BEISNER, *TWELVE AGAINST EMPIRE: THE ANTI-IMPERIALISTS, 1898-1900* (1968); D. HEALY, *supra* note 286, at 213-47; E. TOMPKINS, *supra* note 286.

290. See Baldwin, *The Historic Policy of the United States as to Annexation*, 2 YALE REV. 133, 156-57 (1893); Cooley, *Grave Obstacles to Hawaiian Annexation*, 15 FORUM 389 (1893); Curtis, *The Sandwich Islands: II. Is it Constitutional?*, 156 N. AM. REV. 282 (1893); Patterson, *The Constitutional Effect of Hawaiian Annexation Upon the Tariff Act of 1890*, 33 AM. L. REG. 309 (1893).

291. See Bacon, *Territory and the Constitution*, 10 YALE L.J. 99 (1901); Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393 (1899); Burgess, *How May the United States Govern Its Extra-Continental Territory*, 14 POL. SCI. Q. 1 (1899); Fuller, *Some Constitutional Questions Suggested by Recent Acquisitions*, 1 COLUM. L. REV. 108 (1901); Howland, *The Legal Status of Our New Possessions*, 6 W. RES. L.J. 189 (1901); Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291 (1898); Shipman, *Webster on the Territories*, 9 YALE L.J. 185 (1900); Whitney, *Another Philippine Constitutional Question—Delegation of Legislative*

stitution was made only for the states.<sup>292</sup> Besides judicial and legislative precedents, some of the traditionalists supported their arguments with natural rights rhetoric<sup>293</sup> and the danger that American republicanism would be destroyed by imperial habits.<sup>294</sup> In response, several of their opponents invoked the wording of the Preamble,<sup>295</sup> the authority of Daniel Webster,<sup>296</sup> the practices of other nations,<sup>297</sup> the odiousness of the Dred Scott decision,<sup>298</sup> and the alleged inferiority of various non-Anglo-Saxon races.<sup>299</sup> Some anti-imperialists argued the applicability of the Constitution in order to prove that the United States must divest itself of such ungovernable territory.<sup>300</sup>

The most significant novelty was presented by Abbott Lawrence Lowell, political science professor, and later president, at Harvard.<sup>301</sup> After exploring the terms of acquisition of prior territories, he concluded that the lawmakers and the treaty-makers had freedom to choose whether or not to designate an acquired territory as part of the United States. If they did not so designate it, then:

[C]onstitutional limitations, such as those requiring uniformity of taxation and trial by jury, do not apply. It may well be that some provisions have a universal bearing because they are in form restrictions upon the power of Congress rather than reservations of rights. Such are the provisions that no bill of attainder or ex post facto law shall be passed, that no title of nobility shall be granted, and that a regular statement and account of all public moneys shall be published from time to time. These rules stand upon a different footing from the rights guaranteed to the citizens, many of which are inapplicable except among a people

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*Power to the President*, 1 COLUM. L. REV. 33 (1901); Woolsey, *The Government of Dependencies*, 13 ANNALS (Supp.) 3 (1899); cf. Freund, *The Control of Dependencies Through Protectorates*, 14 POL. SCI. Q. 19 (1899) (but not if protectorate); Judson, *Our Federal Constitution and the Government of Tropical Territories*, 19 AM. MONTHLY REV. OF REVS. 67 (1899) (but many clauses limited to states). The publication date of each of these articles and those in the succeeding footnotes precedes the decision in the first set of *Insular Cases* in May, 1901.

292. Beach, *Constitutional Expansion*, 8 YALE L.J. 225 (1899); Huffcut, *Constitutional Aspects of the Government of Dependencies*, 13 ANNALS (Supp.) 19 (1899); Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365 (1899); Thayer, *Our New Possessions*, 12 HARV. L. REV. 464 (1899) (with qualifications).

293. Teichmueller, *Expansion and the Constitution*, 33 AM. L. REV. 202 (1899).

294. *Id.* at 210-11; see also Burgess, *supra* note 291, at 3; Fuller, *supra* note 291, at 116-17; cf. Shipman, *supra* note 291, at 206 (quoting Polonius's advice to Laertes).

295. Langdell, *supra* note 292, at 372-73.

296. *Id.* at 382; Huffcut, *supra* note 292, at 32.

297. Gardiner, *Our Right to Acquire and Hold Foreign Territory*, 33 AM. L. REV. 161 (1899); Thayer, *supra* note 292, at 467, 469.

298. Gardiner, *supra* note 297, at 174; Huffcut, *supra* note 292, at 43-44.

299. Gardiner, *supra* note 297, at 180, 187.

300. Baldwin, *supra* note 291, at 409-10; Randolph, *supra* note 291, at 313-15; Teichmueller, *supra* note 293, at 213-14; cf. Shipman, *supra* note 291, at 206 (if a territory is permanently unfit for statehood, we must either amend Constitution or give up the territory); see E. TOMPKINS, *supra* note 286, at 178-82.

301. Lowell, *The Status of Our New Possessions—A Third View*, 13 HARV. L. REV. 155 (1899).

whose social and political evolution has been consonant with our own.<sup>302</sup>

Lowell's distinction between applicable and inapplicable provisions, based on verbal form rather than substance, had no future. His distinction between two kinds of acquired territories, however, based on a political decision to make them part of the United States, would eventually persuade a majority of the Supreme Court.

The first *Insular Cases*, of which the central and most famous was *Downes v. Bidwell*,<sup>303</sup> produced a splintered Court.<sup>304</sup> Henry Billings Brown, the only common member of the majority in all the cases, wrote the lead opinion in *Downes*, speaking only for himself. He relied for the most part on the state membership approach: "The Constitution was created by the people of the United States, as a union of States, to be governed solely by representatives of the States . . . . In short, the Constitution deals with States, their people, and their representatives."<sup>305</sup> Brown dismissed much of the prior judicial discussion as dicta and rejected the *Scott v. Sandford* holding, preferring the contrary authority of Webster, Benton, and the Civil War.<sup>306</sup> Nonetheless, Congress could, by positive enactment, extend the Constitution to particular territories; once done, this process could not be reversed.<sup>307</sup> He then undermined his own argument by suggesting that there might be certain "prohibitions [that] go to the very root of the power of Congress to act at all, irrespective of time or place," or "certain natural rights, enforced in the Constitution," that might automatically be binding in all territories.<sup>308</sup> Yet, as we are a nation, presumptively "our power with respect to [acquired] territories is the same power which other nations have been accustomed to exercise with respect to territories acquired by them."<sup>309</sup> Brown's peroration made explicit his desire not to create obstacles to Congress's pursuit of an imperial destiny.<sup>310</sup>

The more important contribution came from Justice Edward Douglass White. He offered a new constitutional synthesis for the new age, winning the concurrence of Justices Shiras and McKenna,<sup>311</sup> and eventually capturing a

302. *Id.* at 176.

303. 182 U.S. 244 (1901) (holding Congress free of constitutional uniformity requirement in taxing Puerto Rico).

304. See *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); *Huus v. New York & Porto Rico Steamship Co.*, 182 U.S. 392 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901).

305. *Downes*, 182 U.S. at 251 (emphasis deleted); see *id.* at 285.

306. *Id.* at 273-76.

307. *Id.* at 257, 270-71.

308. *Id.* at 277, 282. On the other hand, such legal guarantees would be superfluous since the Anglo-Saxon character can be trusted to rule justly. *Id.* at 280.

309. *Id.* at 285.

310. *Id.* at 286-87. Furthermore, Congress must have the power to annex land without admitting "savages" as citizens. *Id.* at 279-80.

311. Justice Gray, who provided the crucial fifth vote, declared himself as "in substance agreeing with the opinion of Mr. Justice White," *id.* at 345 (Gray, J., concurring), but his brief concurring statement

majority. White firmly rejected Brown's notion that Congress had discretion whether or not to extend the Constitution.<sup>312</sup> Putting the matter in organic law terms, he observed that the Constitution was applicable everywhere and at all times—but that did not mean that its limitations on power were everywhere applicable.<sup>313</sup> The issue was not whether the Constitution itself was operative in Puerto Rico, but whether the particular constitutional provision invoked should be interpreted as applying to Puerto Rico; and White believed he had a systematic approach to this problem of interpretation.<sup>314</sup> The applicability of constitutional limitations depended not on the whim of Congress but on an objective inquiry “into the situation of the territory and its relations to the United States.”<sup>315</sup>

Under White's scheme, the federal government had the power to choose among four courses with respect to foreign territory: to admit it as a state; to incorporate it into the United States as a territory and make it an integral part of the United States; to acquire it but leave it as merely a territory appurtenant to the United States; or to leave it foreign by not acquiring it. Congress could not “extend” the Constitution, but it could extend the United States. Full constitutional protection was reserved for territories that Congress had incorporated into the United States, as opposed to those merely acquired.<sup>316</sup> White did not explore the relationship between incorporated territories and states, relying largely on precedent for his notion that becoming “part of” the United States resulted in further geographical extension of full constitutional protection.<sup>317</sup> He focused instead on the distinction between incorporated and unincorporated territories.

White insisted, in language reminiscent of the derivation of the inherent sovereign right to exclude aliens, that his forefathers must have intended their country to have the same sovereign right to determine the status of newly acquired territories that other sovereigns enjoyed under the law of nations.<sup>318</sup> He quoted a description of that right from Halleck's *International Law*, embodying the view of Vattel, Grotius, Pufendorf, and others that a conquering state may hold new territory under that territory's old constitution, or extend to it the state's own constitution, or pursue such third alternative as seems appropriate.<sup>319</sup> He reinforced the need for this discretion by invoking the

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heavily emphasized the fact that the case involved the temporary government of a territory recently acquired in war. *Id.* at 346.

312. *Id.* at 289 (White, J., joined by Shiras and McKenna, JJ., concurring).

313. *Id.* at 288-89.

314. *Id.* at 292-93.

315. *Id.* at 293.

316. *Id.* at 299. The four dissenters, however, ridiculed this purportedly objective test as devoid of meaning. *Id.* at 372-73 (Fuller, C.J., joined by Harlan, Brewer, and Peckham, JJ., dissenting); *id.* at 391 (Harlan, J., dissenting).

317. *Id.* at 292-93 (White, J., joined by Shiras and McKenna, JJ., concurring).

318. *Id.* at 302.

319. *Id.* at 301-02.

nation's right to protect the birthright of its own citizens by withholding citizenship from acquired populations that might belong to "an uncivilized race" and be "absolutely unfit to receive it."<sup>320</sup>

White did not explore the moral question of where the United States got the right to "liberate" Spanish colonies whose populations had done it no wrong and then to hold them as conquered territories appurtenant without their consent. The international law of his day had left behind Enlightenment idealism in such matters. But White did not wholly relegate unincorporated territories to the ruthless positivism of late nineteenth-century international law. He maintained that even unincorporated territories benefit from "inherent, although unexpressed, principles which are the basis of all free government . . . restrictions of so fundamental a nature that they cannot be transgressed."<sup>321</sup>

White did not make clear how to identify those fundamental prohibitions that extend to unincorporated territories. But one might suspect that he had updated the membership approach by making the background natural law rights legally enforceable. And indeed a few years later, in a case refusing grand and petit jury rights to inhabitants of Hawaii, White simply cited decisions holding those rights inapplicable to actions of the *states*, and denied that they were "fundamental provisions of the Constitution, which were by their own force applicable to the territory."<sup>322</sup> In other words, he employed the same kind of natural law methodology then being used by the majority in deciding Fourteenth Amendment due process cases.

The most fully articulated dissent<sup>323</sup> came from the elder Justice John Marshall Harlan. Harlan unambiguously expounded a municipal law conception of the Constitution. Against *Brown*, he asserted, "The Constitution speaks not simply to the States in their organized capacities, but to all peoples, whether of States or territories, who are subject to the authority of the United States."<sup>324</sup> He tied this argument in with the wording of the supremacy clause: the fact that this clause speaks of the Constitution as

"the supreme law of the land," is a fact of no little significance. The "land" referred to manifestly embraced all the peoples and all the

320. *Id.* at 306.

321. *Id.* at 291. Later in the opinion White rephrased his position as affording unincorporated territories the protection of those "general prohibitions in the Constitution in favor of the liberty and property of the citizen which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts." *Id.* at 294.

322. *Hawaii v. Mankichi*, 190 U.S. 197, 220-21 (1903) (White, J., joined by McKenna, J., concurring).

323. Chief Justice Fuller wrote on behalf of all four dissenters. He demolished *Brown's* claims of precedential support for a Websterian membership approach. Fuller mocked the "occult meaning" of White's incorporation theory, 182 U.S. at 373 (Fuller, C.J., joined by Harlan, Brewer, and Peckham, JJ., dissenting), but had difficulty refuting this mystery in detail. He rejected all policy arguments based on the need to accommodate colonialism.

324. *Id.* at 378 (Harlan, J., dissenting).

territory, whether within or without the States, over which the United States could exercise jurisdiction or authority.<sup>325</sup>

Against White, he insisted that the proper understanding of when a territory was “a part of, and incorporated into, the United States” was whether it was “for all purposes of government by the Nation, under the complete jurisdiction of the United States . . . subject to all the authority which the National Government may exert over any territory or people.”<sup>326</sup>

Harlan distinguished vehemently, if not wholly convincingly, his prior decision in *Neely v. Henkel*,<sup>327</sup> which arose out of the American occupation of Cuba in the wake of the Spanish-American War. “Temporary” military occupation of foreign territory, without the intention of acquiring sovereignty, did not bring it under the Constitution.<sup>328</sup>

Harlan exhibited not only the territorialist disposition of the nineteenth-century municipal law approach, but also its characteristic insistence on compliance with positive constitutional provisions, regardless of whether they had any basis in natural law: “If the Constitution is in force in any territory, it is in force there for every purpose embraced by the objects for which the Government was ordained.”<sup>329</sup> Harlan’s literal demands continued his ongoing dispute with his colleagues over the applicability of the Bill of Rights to the state governments through the Fourteenth Amendment.<sup>330</sup> Harlan stubbornly insisted that the Bill of Rights identified “certain guaranties of the rights of life and liberty, and property, which had long been deemed fundamental in Anglo-Saxon institutions,”<sup>331</sup> with which the states were not free to experiment.

325. *Id.* at 383, 384-85.

326. *Id.* at 389.

327. 180 U.S. 109 (1901). There the Court had unanimously upheld extradition of a dishonest American official to Cuba for trial without jury under the military government of General Leonard Wood. Treating the case as extraterritorial, Harlan had written that the jury trial guarantees “have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country.” *Id.* at 122.

328. 182 U.S. at 387-88 (Harlan, J., dissenting). White had invoked *Neely* as precedent on his side. *Id.* at 343-44 (White, J., concurring).

329. *Id.* at 385.

330. See *Twining v. New Jersey*, 211 U.S. 78 (1908) (Court holds privilege against self-incrimination inapplicable to states; Harlan dissents); *West v. Louisiana*, 194 U.S. 258 (1904) (Court holds right to confrontation inapplicable to states; Harlan dissents); *Maxwell v. Dow*, 176 U.S. 581 (1900) (Court holds right to jury of twelve inapplicable to states; Harlan dissents); *O’Neil v. Vermont*, 144 U.S. 323 (1892) (Court holds ban on cruel and unusual punishment inapplicable to states; Harlan dissents); *Hurtado v. California*, 110 U.S. 516 (1884) (Court holds requirement of grand jury indictment inapplicable to states; Harlan dissents); cf. *Patterson v. Colorado*, 205 U.S. 454 (1907) (Court does not reach applicability of First Amendment to states; Harlan dissents); *Talton v. Mayes*, 163 U.S. 376 (1896) (Harlan notes dissent to decision holding grand jury requirement inapplicable to Cherokee Nation).

331. *Hurtado v. California*, 110 U.S. 516, 539 (1884) (Harlan, J., dissenting). Unlike his successor Hugo Black, Harlan also found room in the Constitution for unenumerated rights to liberty of occupation, liberty of contract, and expansive concepts of taking without just compensation in such areas as taxation and rate regulation. See, e.g., *Adair v. United States*, 208 U.S. 161 (1908); *Norwood v. Baker*, 172 U.S. 269 (1898); *Smyth v. Ames*, 169 U.S. 466 (1898); *Powell v. Pennsylvania*, 127 U.S. 678 (1888); see also *Lochner v. New York*, 198 U.S. 45, 65 (1905) (Harlan, J., dissenting) (finding sufficient basis for regulation of bakers’ hours); G. E. WHITE, *supra* note 285, at 130, 134-38.

Over the next decade, White solidified the Court behind his brainchild.<sup>332</sup> In 1922, Chief Justice Taft, the former Governor of the Philippines, explained that even the conferral of United States citizenship on the residents of Puerto Rico in its 1917 organic act did not suffice to incorporate it in the United States.<sup>333</sup> Taft added:

We need not dwell on another consideration which requires us not lightly to infer, from acts thus easily explained on other grounds, an intention to incorporate in the Union these distant ocean communities of a different origin and language from those of our continental people. Incorporation has always been a step, and an important one, leading to statehood.<sup>334</sup>

As a result, the defendant newspaper editor had no right to jury trial in his misdemeanor prosecution for libelling the island's Governor.

There is no justification for sentimentality about the *Insular Cases*. I mentioned earlier that writers in the natural law school approved of conquerors who permitted a new territory to keep its old constitution. The *Insular Cases* did not represent such an accommodation to the conquered, but rather were designed for the convenience of the conqueror. Nonetheless, they claimed to offer unincorporated territories a skeletal constitution that protected natural/fundamental rights and that therefore might be minimally worthy of the imputed consent of those present in the territory. Over the years, the list of rights has grown in parallel with (though it has not kept up with) the expansion of Fourteenth Amendment due process rights against state governments.<sup>335</sup> Thus, in one sense, *Downes* and *Balzac* bring us back to the Alien and Sedition Act debate: the Constitution as written for "We the People" in the States and in those territories admitted onto the path to statehood, natural and statutory rights in those territories that are not. But those natural rights that the Court chooses to recognize become part of the fundamental law in the territory and, unlike eighteenth-century natural law, override positive statutes in the manner of due process.

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332. See J. TORRUELLA, *supra* note 8, at 62-84 (1985); Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823 (1926). Harlan vowed eternal dissent from the theory of the *Insular Cases*, see *Dorr v. United States*, 195 U.S. 138, 155-56 (1904) (Harlan, J., dissenting), and continued to dissent until his death in 1911. See *Dowdell v. United States*, 221 U.S. 325, 333 (1911); *Gavieres v. United States*, 220 U.S. 338, 345 (1911); *Trono v. United States*, 199 U.S. 521, 535 (1905).

333. *Balzac v. Porto Rico*, 258 U.S. 298 (1922). See J. TORRUELLA, *supra* note 8, at 85-100; Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans*, 127 U. PA. L. REV. 390 (1978). (The island's name was officially misspelled "Porto Rico" from 1898 to 1932. See *id.* at 392 n.1.)

334. 258 U.S. at 311.

335. See, e.g., *Torres v. Puerto Rico*, 442 U.S. 465, 469-71 (1979).



## IV. MODERNISM AND EXTRATERRITORIALITY

The preceding history makes possible a deeper understanding of the Supreme Court's watershed decision in *Reid v. Covert*,<sup>336</sup> ending the regime of strict territoriality, and the subsequent controversies over the extraterritorial extension of modern American constitutionalism with its emphasis on individual rights. Hugo Black's plurality opinion in *Reid v. Covert*, a classic of Warren Court reform,<sup>337</sup> reinvigorated the municipal law approach, and even contained some passages that were susceptible to a universalist interpretation. Since that time, courts and commentators have struggled—mostly on a case-by-case basis—with the international ramifications of an expanding constitutionalism. The Rehnquist Court has now sought to limit this expansion, holding in *United States v. Verdugo-Urquidez*<sup>338</sup> that Fourth Amendment warrant requirements do not bind federal searches of nonresident alien defendants' property outside United States territory. Like his predecessor Edward Douglass White, Chief Justice Rehnquist expressly invoked considerations of international realpolitik to support nonapplicability of constitutional rights. But, as we shall see, there is disagreement even among the majority concerning the extraterritorial rights of aliens under the Constitution.

A. *Does the Constitution Follow the Passport?*

The groundwork for the modernist breakthrough in *Reid v. Covert* lies in the variety of constitutional changes intervening between the 1920's and the 1950's. By the 1950's, military and economic crises had vastly increased the power of the executive branch. The United States had consolidated its great power status and had gone on to become a superpower. American soldiers and American corporations had spread pervasively across the globe, and the exercise of prescriptive jurisdiction on the nationality principle had become more common. Freewheeling judicial review had struggled against the New Deal and lost, and substantive due process was reputedly dead and buried. In *Brown v. Board of Education*, the Warren Court had reestablished the commitment to racial equality that its predecessors had compromised after Reconstruction—the Court would no longer be able to call upon the frank racism that informed the rationale of the *Insular Cases*.

The Second World War and the following occupation had brought pressures for wider application of constitutional rights. The Supreme Court rejected, sometimes over dissents, challenges brought by American soldiers, civilians,

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336. 354 U.S. 1 (1957).

337. The decision not only overturned the strict territoriality rule and limited military jurisdiction over civilians, but also resolved recurring uncertainties over the relationship between the Bill of Rights and the treaty power. *See, e.g.,* L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 139 (1972).

338. 110 S. Ct. 1056 (1990).

and former enemies to actions of military authorities abroad.<sup>339</sup> The Court of Claims twice held the government liable under the takings clause to citizens for actions of the Army abroad.<sup>340</sup>

The challenges finally succeeded on rehearing in *Reid v. Covert*. The companion cases involved criminal prosecutions in England and Japan—by courts-martial and therefore without Article III judges, indictment, or jury trial—of widows of servicemen charged with the murders of their husbands. On first hearing, a majority treated the cases as routine applications of the *Insular Cases* and *In re Ross*.<sup>341</sup> Amid unusual assertions that time constraints had prevented the Court from considering the case fully,<sup>342</sup> rehearing was granted, and on the second round the Bill of Rights burst the bounds of territoriality. But the new majority of six split between two opposing rationales.

Justice Black's opinion for the plurality of four (with Chief Justice Warren, Justice Douglas, and Justice Brennan) began its constitutional discussion with a heavy emphasis on citizenship:

At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.<sup>343</sup>

In confronting the key precedent of *In re Ross*,<sup>344</sup> Black emphasized the tension between its holding that American criminal laws can have extraterritorial

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339. See *Madsden v. Kinsella*, 343 U.S. 341 (1952) (upholding trial by occupation court of American citizen civilian); *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (denying enemy soldiers abroad due process rights and access to American courts); *id.* at 791 (Black, Douglas, and Burton, JJ., dissenting); *Hirota v. MacArthur*, 338 U.S. 197 (1949) (finding Allied war crimes tribunal in Tokyo not to be instrumentality of United States); *Wade v. Hunter*, 336 U.S. 684 (1949) (resolving on other grounds double jeopardy challenge to court-martial of American soldier in Germany); *id.* at 692 (Murphy, Douglas, and Rutledge, JJ., dissenting); Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587 (1949). *But cf.* *Best v. United States*, 184 F.2d 131, 138 (1st Cir. 1950) (assuming, in treason prosecution, that Fourth Amendment applies to search of citizen's apartment by army of occupation).

340. See *Seery v. United States*, 127 F. Supp. 601 (Ct. Cl. 1955) (use of Maria Jeritza's villa in Austria as officers' club); *Turney v. United States*, 115 F. Supp. 457 (Ct. Cl. 1953) (taking of radar equipment in post-independence Philippines).

341. See *Kinsella v. Krueger*, 351 U.S. 470, 475 (1956); *Reid v. Covert*, 351 U.S. 487, 488 (1956) (following *Krueger*).

342. See *Reid v. Covert*, 354 U.S. 1, 65 (1957) (Harlan, J., concurring); *Krueger*, 351 U.S. at 483-85 (1956) ("Reservation of Mr. Justice Frankfurter"); *id.* at 486 (Warren, C.J., Black and Douglas, JJ., dissenting). For an advocate's account, see Wiener, *Persuading the Supreme Court to Reverse Itself: Reid v. Covert*, 14 LITIGATION 6 (Summer 1988).

343. 354 U.S. at 5-6 (Black, J., joined by Warren, C.J., Douglas, and Brennan, JJ.) (footnotes omitted).

344. 140 U.S. 453 (1891). See *supra* text accompanying notes 279-84.

applicability and its holding that the American Constitution cannot;<sup>345</sup> here he cited modern cases sustaining the exercise of jurisdiction on the nationality principle, beginning with the 1922 case of *United States v. Bowman*.<sup>346</sup>

Black also permitted himself to conflate the application of constitutional limitations in foreign countries with the application of constitutional limitations in unincorporated territories.<sup>347</sup> He suggested that the *Insular Cases* might be distinguished "in that they involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions whereas here the basis for governmental power is American citizenship."<sup>348</sup> But he made clear his dissatisfaction with those cases,<sup>349</sup> and their tendency to "destroy the benefit of a written Constitution and undermine the basis of our Government."<sup>350</sup> Black rejected judicial discretion to identify "fundamental" rights applicable outside the continental United States.<sup>351</sup> This was hardly surprising, given Black's ongoing campaign to incorporate the Bill of Rights in the Fourteenth Amendment, both to protect individual liberties prized by the Framers and to diminish reliance on the subjective opinions of judges.<sup>352</sup>

Some have interpreted Black's opinion as adopting an organic law view of the Constitution, dictating a universalist interpretation of constitutional rights.<sup>353</sup> Up until this point, universalism had played almost no role in American constitutionalism because the overwhelming acceptance of strict territoriality, even for citizens, had focused attention on the question of how closely the Constitution followed the flag. The second, third, and fourth sentences of the paragraph quoted above might lend some support to a universalist reading. But in other respects his opinion reveals a pronounced emphasis on the citizenship of the defendants. The paragraph continues by citing as illustrations of its principle St. Paul's assertion of the rights of Roman citizenship,<sup>354</sup>

345. 354 U.S. at 12.

346. 260 U.S. 94 (1922).

347. See 354 U.S. at 8-9 & nn.10-11, 12 n.19. This was only fair, since White had also conflated them, for the opposite purpose, in *Hawaii v. Mankichi*, 190 U.S. 197, 220 (1903) (White, J., concurring), and Justice Clark had conflated them in the first hearing of *Reid v. Covert*; see also *Kinsella v. Krueger*, 351 U.S. 470, 474-76, 479 (1956).

348. 354 U.S. at 14.

349. *Id.* ("Moreover, it is our judgment that neither the cases nor their reasoning should be given any further expansion.").

350. *Id.*

351. *Id.* at 9 ("[W]e can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal government by the Constitution and its Amendments.").

352. See, e.g., *Adamson v. California*, 332 U.S. 46, 70-71, 90-92 (1947) (Black, J., dissenting).

353. See *supra* text accompanying note 29 (describing organic law argument).

354. 354 U.S. at 6; see ACTS 22:25-27. Black's citation ironically recalled his response to the use of the same passage by Justice Jackson to support what Black considered an overemphasis on citizenship in *Johnson v. Eisentrager*, 339 U.S. 763, 769 (1950) (Jackson, J.) (habeas corpus unavailable to enemy aliens in occupied Germany); see *id.* at 798 (Black, J., dissenting) ("I would hold that our courts can exercise [habeas] whenever any United States official illegally imprisons any person in any land we govern.") (footnote omitted).

and the British constitutional principle that Englishmen carry with them "the duty of obedience to the lawful commands of the Sovereign, [and] . . . all the rights and liberties of British Subjects."<sup>355</sup>

Black's plurality opinion in *Reid v. Covert* thus represents a modern realignment of the municipal law approach, taking into fuller account the exercise of prescriptive jurisdiction over American citizens worldwide under the nationality principle. The Bill of Rights not only follows the flag, but also follows every United States citizen, just as the legislative power of Congress does. Black's attitude of rigorous positivism resonates more with the views expressed in Justice Curtis's dissent in *Scott v. Sandford* than with those of the elder Harlan.<sup>356</sup> But all of Black's municipal law predecessors would agree with him that "[t]he rights and liberties which citizens of our country enjoy . . . have been jealously preserved from the encroachments of Government by express provisions of our written Constitution."<sup>357</sup>

Justice Frankfurter and the second Justice Harlan filed separate concurring opinions in *Reid v. Covert*. These Justices were, of course, defenders of a restrained residuum of the substantive due process doctrine, and staunch opponents of Black's incorporation theory of the Fourteenth Amendment.<sup>358</sup> Frankfurter accordingly wrote with approval of White's methodology in the *Insular Cases*. He agreed that the Constitution itself was everywhere applicable, though some of its provisions might not be.<sup>359</sup> Frankfurter observed:

The process of decision appropriate to the problem led to a detailed examination of the relation of the specific "Territory" to the United States. This examination, in its similarity to analysis in terms of "due process," is essentially the same as that to be made in the present cases in weighing congressional power to make "Rules for the Government and Regulation of the land and naval Forces" against the safeguards of Article III and the Fifth and Sixth Amendments.<sup>360</sup>

Harlan agreed that

the question is *which* guarantees of the Constitution *should* apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it. The question is one of judgment, not of compulsion. And so I agree with my brother Frankfurter that, in view of *Ross* and the *Insular Cases*, we have before us a question analogous, ultimately, to issues of due process; one can say, in fact, that the question of which specific safeguards of the Consti-

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355. 354 U.S. at 6.

356. See *supra* text accompanying notes 266-67 and *supra* note 331.

357. 354 U.S. at 6-7 (citing *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833)).

358. See, e.g., *Poe v. Ullman*, 367 U.S. 497 (1961) (Harlan, J., dissenting); *Rochin v. California*, 342 U.S. 165 (1952) (Frankfurter, J.).

359. See 354 U.S. at 51, 56 (Frankfurter, J., concurring).

360. *Id.* at 53.

tution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is “due” a defendant in the particular circumstances of a particular case.<sup>361</sup>

Frankfurter and Harlan explicitly limited their discussions to concluding that the procedure at issue—military trial of civilian dependents, without indictment, without jury, and in a capital case—failed this flexible test. Frankfurter ostentatiously refused to state whether any lesser combination of these elements would violate the Constitution.<sup>362</sup> Harlan expressly stated that he remained persuaded that affording jury trial to civilian dependents prosecuted for “run-of-the-mill offenses” would be impractical for the very reasons of cost and difficulty of administration that the dissenters considered sufficient to justify denial of jury trial in capital cases.<sup>363</sup>

For the most part, Frankfurter and Harlan reasoned *from the Insular Cases*, and not about them. They treated those cases as precedent for the proposition that some degree of constitutional protection extended “overseas,” and explained the exceptions as resting on practical, not theoretical, distinctions. They did not ask what made federal jury trials more impractical, anomalous or uncongenial<sup>364</sup> in the Territory of Puerto Rico in 1922 than in the State of Louisiana in 1813.

Frankfurter and Harlan held out the possibility of more widespread constitutional protection than had previously been afforded, but at the cost of diluting its content. Their approach might support constitutional enforcement of bedrock human rights, even those of aliens, against United States action in foreign countries without “anomalous” extension of domestic institutions. On the other hand, the “due process” inquiry freed itself of both constitutional text and natural law as either benchmarks or justifications.<sup>365</sup> The availability of a particular right would vary from context to context in accord with judicial evaluations of practicality. This balancing approach contemplated an extraordinary degree of both judicial discretion and deference to the choices of the political branches.

These characteristics were confirmed three years later in *Kinsella v. United States ex rel. Singleton*<sup>366</sup> and its companion cases, where Frankfurter and Harlan were willing to extend the benefit of *Reid v. Covert* to civilian employ-

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361. *Id.* at 75 (Harlan, J., concurring).

362. *See id.* at 44-45 (Frankfurter, J. concurring).

363. *Id.* at 75-76 (Harlan, J., concurring). He reiterated this view, with Frankfurter's agreement, in his dissenting opinion in *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 258 (1960) (Harlan, J., joined by Frankfurter, J., dissenting). *See infra* text accompanying note 366.

364. *See* 354 U.S. at 51 (Frankfurter, J., concurring); *id.* at 75 (Harlan, J., concurring).

365. The same may be said of Chief Justice Burger's recasting, whether deliberate or inadvertent, of the test for applicability of constitutional rights in an unincorporated territory in *Torres v. Puerto Rico*, 442 U.S. 465 (1979).

366. 361 U.S. 234, 249 (1960) (Harlan, J., joined by Frankfurter, J., dissenting); *see id.* at 258 (“Those problems are fraught with many factors that this Court is ill-equipped to assess, and involve important national concerns into which we should be reluctant to enter except under the clearest sort of constitutional compulsion.”).

ees of the armed services accused of capital crimes, but dissented from its extension to noncapital crimes. *Singleton* should not be overlooked in a lawyerly account of these developments, because in *Singleton* the *Reid v. Covert* plurality garnered a majority. Justice Clark, bowing to precedent but rejecting the discretionary due-process-balancing approach of the Frankfurter-Harlan concurrence, gave his support to the requirement of civilian jury trial for the broader class of prosecutions of civilian citizens abroad.<sup>367</sup>

### B. After Hegemony

As the Bill of Rights expanded under the Warren Court and the early Burger Court, lower courts read *Reid v. Covert* broadly as confirming citizens' rights against federal action on the high seas and in foreign countries. A substantial body of criminal procedure cases resulted, as well as occasional noncriminal cases.<sup>368</sup> Some courts were hesitant to deny similar protection to aliens abroad,<sup>369</sup> and two well-known holdings boldly provided such protection.<sup>370</sup> By 1987, the American Law Institute was prepared to restate as to citizens: "The provisions of the United States Constitution safeguarding individual rights . . . generally limit governmental authority whether it is exercised in the United States or abroad,"<sup>371</sup> but still regarded the rights of aliens as less certain.<sup>372</sup> At the same time, over the 1970's and 1980's, American self-confidence in global affairs was shrinking, and this era of limits

367. See *id.* (extending *Reid v. Covert* to dependents of service personnel accused of noncapital crimes); *Grisham v. Hagan*, 361 U.S. 278 (1960) (extending it from dependants of service personnel to civilian employees of armed forces accused of capital crimes); *McElroy v. Guagliardo*, 361 U.S. 281 (1960) (extending it to civilian employees of armed forces accused of noncapital crimes). Clark's opinions do not include the same rhetorical emphasis that Black had placed on citizenship, but neither do they explicitly argue for expanding the coverage of the case to noncitizens. Justices Whittaker and Stewart concurred in the dependent case but dissented in the case of civilian employees; their opinion did call attention to the citizenship of all these defendants. *Singleton*, 361 U.S. at 259-60.

368. See, e.g., *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) (due process protection against military use of property in Honduras), *vacated as moot*, 471 U.S. 1113 (1985); *Powell v. Zuckert*, 366 F.2d 634 (D.C. Cir. 1966) (evidence seized under general warrant in Japan is inadmissible in personnel action); *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144 (D.D.C. 1976) (First, Fourth, and Sixth Amendment claims of citizens in Germany). Criminal procedure cases are collected in, for example, Saltzburg, *supra* note 6.

369. See, e.g., *Cardenas v. Smith*, 733 F.2d 909, 915-17 (D.C. Cir. 1984) (leaving open constitutional rights of nonresident alien regarding U.S. interference with Swiss bank account); *Sami v. United States*, 617 F.2d 755, 773-74 (D.C. Cir. 1979) (finding no violation of rights in arrest of alien by foreign government at U.S. request, even if such rights exists); *United States v. Rubies*, 612 F.2d 397 (9th Cir. 1979) (assuming alien on high seas has Fourth Amendment rights, search was nonetheless reasonable).

370. See *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974) (finding Fourth and Fifth Amendments applicable to alleged search, interrogation under torture, and abduction of alien in Uruguay by federal agents); *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. for Berlin 1979) (finding constitutional right to jury trial in prosecution by U.S. authorities in Berlin).

371. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 721 (1987).

372. *Id.* § 722 comment m ("Although the matter has not been authoritatively adjudicated, at least some actions by the United States in respect of foreign nationals outside the country are also subject to constitutional limitations.").

prompted arguments that the United States could ill afford constitutional constraints not binding on its partners and rivals.<sup>373</sup>

Modern international law permits nations to apply their laws in certain circumstances to actions taken by noncitizens outside the nation's territory, because of the effects of those actions on the government, its territory, or sometimes even its citizens outside the territory. Since the Second World War, the United States has greatly increased its exercise of jurisdiction on these bases, often to the alarm of our European allies.<sup>374</sup> More recently, the United States has intensified its efforts to combat the narcotics trade by prosecuting aliens for acts committed far outside the United States.<sup>375</sup> Once these defendants have been brought to the United States for prosecution, courts have afforded them full substantive and procedural rights at trial under the Constitution, as even the strict territoriality rule would require.<sup>376</sup>

Courts have been more divided, however, in responding to Fourth Amendment objections to search and seizure incidents occurring on the high seas or in foreign countries.<sup>377</sup> Such an incident finally gave the Supreme Court the occasion to address the extraterritorial rights of aliens in the post-*Reid v. Covert* world, in the 1990 case of *United States v. Verdugo-Urquidez*. Verdugo-Urquidez was an alleged Mexican druglord being prosecuted for narcotics trafficking activities. By the time the case came to the Supreme Court, Verdugo-Urquidez had been convicted in a separate prosecution for involvement in the notorious torture-murder of DEA agent Enrique Camarena Salazar. Verdugo-Urquidez was seized by Mexican police and delivered into American custody at a California border station. The next day, while he was incarcerated in San Diego, DEA agents, in concert with Mexican police, searched his home in Mexicali, Mexico and found business records of his narcotics smuggling enterprise. A divided Ninth Circuit panel suppressed this evidence as having been seized in violation of the warrant clause of the Fourth Amendment. The Supreme Court reversed, with six Justices (in three different opinions) agreeing that the search should be upheld because the warrant clause of the Fourth Amendment had no application to the search of a nonresident alien's property in a foreign country. Three Justices dissented.

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373. See H. KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 208-10 (1990).

374. See, e.g., 18 U.S.C. § 2331 (1988); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402-416; *Symposium, Extraterritoriality of Economic Legislation*, 50 LAW & CONTEMP. PROBS. No. 3 (Summer 1987).

375. See, e.g., 46 U.S.C. app. § 1903 (1988).

376. See, e.g., *United States v. Robinson*, 843 F.2d 1 (1st Cir. 1988) (ex post facto clause); *United States v. Ospina*, 823 F.2d 429 (11th Cir. 1987) (grand jury); *United States v. Gonzalez*, 776 F.2d 931 (11th Cir. 1985) (due process notice requirements and ex post facto clause); *United States v. Henriquez*, 731 F.2d 131 (2d Cir. 1984) (due process and double jeopardy); *United States v. Toscanino*, 500 F.2d 267, 281 (2d Cir. 1974) (Anderson, J., concurring) (due process).

377. See, e.g., *United States v. Williams*, 617 F.2d 1063 (5th Cir. 1980) (en banc); *id.* at 1090 (Roney, J., specially concurring); *United States v. Rubies*, 612 F.2d 397 (9th Cir. 1979); *Toscanino*, 500 F.2d 267 (2d Cir. 1974); *id.* at 281 (Anderson, J., concurring in result).

Chief Justice Rehnquist's opinion was denominated an Opinion of the Court, and Justice Kennedy purported to concur in it, but Kennedy's concurring opinion diverged so greatly from Rehnquist's analysis and conclusions that Rehnquist seemed to be really speaking for a plurality of four.<sup>378</sup> Rehnquist marshalled a series of arguments in the membership tradition, which individually pointed toward different but overlapping conclusions: (i) that Verdugo-Urquidez had no Fourth Amendment rights at all, (ii) that aliens have no Fourth Amendment rights with regard to United States government action abroad, and (iii) that aliens have no constitutional rights whatsoever with regard to United States government action abroad.

Verdugo-Urquidez was, unquestionably, within the United States at the time the search in Mexico occurred. To say that he had no Fourth Amendment rights at all, therefore, would involve a retreat from the traditional municipal law approach to aliens' rights *within* the United States. Only four Justices, however, lent credence to this argument.<sup>379</sup> It relied on a tentative "textual exegesis" of the Fourth Amendment's opening words: "The right of the people to be secure . . ." Rehnquist suggested that "the people" was used as a "term of art" in the Constitution, and "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."<sup>380</sup> Verdugo-Urquidez, having been involuntarily brought into the United States shortly before the search, was not within this class.<sup>381</sup>

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378. See 110 S. Ct. at 1066-68 (Kennedy, J., concurring). The other three members of the plurality were Justices White, O'Connor and Scalia. Justice Stevens concurred only in the judgment, finding the search reasonable and the warrant clause inapplicable outside the jurisdiction of the United States "because American magistrates have no power to authorize such searches," and finding broader comment unnecessary. *Id.* at 1068 & n.\*. Justice Blackmun dissented, on grounds relating to the unreasonableness of the search, but he also believed the warrant clause was inapplicable. *Cf. infra* text accompanying note 401 (discussing Blackmun's approach to the warrant clause). Justice Kennedy addressed the warrant issue at length, but it is difficult to ascertain what position he took regarding reasonableness. See 110 S. Ct. at 1068 (Kennedy, J., concurring).

379. Justice Kennedy specifically rejected this argument. See 110 S. Ct. at 1067-68 (Kennedy, J., concurring).

380. *Id.* at 1061. This argument, which Rehnquist characterized as "by no means conclusive," *id.*, seems to be a makeweight, and the Justices of the plurality seem not to have considered its implications carefully. I do not think that *anyone*, and certainly not Chief Justice Rehnquist or Justice White, has previously argued that the "People" of the Preamble or the "people" to whom powers not delegated were reserved by the Tenth Amendment included resident aliens, let alone the broader class described here. See *Toll v. Moreno*, 458 U.S. 1, 25-49 (1982) (Rehnquist, J., dissenting); *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (White, J.); *Sugarman v. Dougall*, 413 U.S. 634, 649-64 (1973) (Rehnquist, J., dissenting); see also *Foley v. Connelie*, 435 U.S. 291, 292-300 (1978) (Burger, C.J., joined by Stewart, White, Powell, and Rehnquist, JJ.). Rehnquist's argument should imply a much greater convergence between citizenship and resident alien status than previous case law indicates. See, e.g., Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENTARY 9 (1990).

381. 110 S. Ct. at 1064. The argument that a defendant has *no* Fourth Amendment rights because she is in the country involuntarily is shocking and unacceptable. To argue that searches of the body cavities of a prisoner in a San Diego jail who has recently been brought into the United States by force are unlimited by the Fourth Amendment would be a perversion of the notion of the moral relevance of consent. In one sense, this argument is deeply faithful to American tradition: slaves were involuntarily in the country, and they had no constitutional rights either.



Rehnquist next turned to the argument for the narrower proposition that nonresident aliens have no Fourth Amendment rights against searches and seizures of their property abroad, which was what the Opinion actually described itself as holding.<sup>382</sup> He cited historical data indicating the Framers' primary concern with searches within the United States, and their probable assumption that the Fourth Amendment did not limit searches and seizures on the high seas during the quasi-war with France in the 1790's.<sup>383</sup> If these data suggest anything, however, it is that *no one* has Fourth Amendment rights outside the nation's borders, which of course was the prevailing view under both municipal law and membership approaches until *Reid v. Covert*.

The opinion reached stronger ground with a formalist argument from precedent: no prior case holds that aliens have constitutional rights against United States action abroad, some cases have denied that they have such rights, and the *Insular Cases* hold that even American citizens have less than full constitutional rights in "unincorporated territories."<sup>384</sup> This is perfectly true. To find that aliens have extraterritorial constitutional rights would be an extension of prior law. *Reid v. Covert* does not *require* such an extension as a matter of precedent, because *Reid v. Covert* involved citizens.<sup>385</sup> Of course, that does not suffice to explain why the recognition of extraterritorial constitutional rights in *Reid v. Covert* does not destroy the persuasive power of the earlier precedents.

Finally, at the end of his opinion, Rehnquist gave two linked reasons why aliens should not have extraterritorial Fourth Amendment rights. First, grave uncertainties would be created for the United States' employment of armed force abroad in non-law-enforcement situations.<sup>386</sup> Second, conditions abroad often differ from local conditions in ways that would make observance of constitutional requirements an inappropriate hindrance to law enforcement

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382. See *id.* at 1059.

383. *Id.* at 1061-62. The opinion mentioned only seizures of foreign vessels, but the statutes and the cases of the period also involve seizures of American vessels trading with France. See *id.* at 1062 (citing Act of February 9, 1799, ch. 2, 1 Stat. 613); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

384. 110 S. Ct. at 1062-63.

385. *Id.* at 1063. Moreover, Rehnquist emphasized that Black's opinion in *Reid v. Covert* was only a plurality opinion, and that Frankfurter and Harlan had concurred on narrower grounds that did not guarantee even a citizen full constitutional rights in foreign territory. *Id.* The Court gave no weight to the fact that a fifth Justice later joined in rejecting the methodology of the Frankfurter-Harlan concurrence. See *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960) (extending *Reid v. Covert* to dependents of service personnel accused of noncapital crimes); *McElroy v. Guagliardo*, 361 U.S. 281 (1960) (same for civilian employees of armed forces).

386. 110 S. Ct. at 1065-66. He understandably did not mention the example of mixed law-enforcement and non-law-enforcement activity that could not have been far from the Justices' minds—the December 1989 invasion of Panama to topple and arrest General Noriega. See Leich, *Contemporary Practice of the United States Relating to International Law*, 84 AM. J. INT'L L. 536, 547 (1990) (quoting State Department's identification of U.S. objectives as: "(1) to protect American lives; (2) to assist the lawful and democratically elected government in Panama in fulfilling its international obligations; (3) to seize and arrest General Noriega, an indicted drug trafficker; and (4) to defend the integrity of United States rights under the Panama Canal treaties.").

activities. "For better or worse, we live in a world of nation-states in which our Government must be able to 'functio[n] effectively in the company of sovereign nations.'" <sup>387</sup> At least as regards the Fourth Amendment, this is an unabashedly Hobbesian membership approach. <sup>388</sup>

Kennedy purported to concur in the majority opinion, but formulated his reasons quite differently. He denied that the reference to "the people" in the Fourth Amendment had any limiting significance. <sup>389</sup> Kennedy maintained that "the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory." <sup>390</sup> Things might be different extraterritorially with regard to citizens, "as to whom the United States has continuing obligations." <sup>391</sup> Kennedy explicitly positioned himself in the line of Harlan's concurrence in *Reid v. Covert*, tracking its reasoning and quoting it at length. <sup>392</sup> He adopted the view that the question of what the Constitution requires abroad "can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case." <sup>393</sup> Extending the Fourth Amendment's warrant requirement to extraterritorial searches of aliens' property would be "impracticable and anomalous;" <sup>394</sup> Kennedy apparently believed that this was always true as regards aliens, but left open the issue of extraterritorial searches of citizens' property. <sup>395</sup> In other respects, Kennedy wrote narrowly à la Harlan, agreeing to uphold the present search without stating categorically that nonresident aliens always lacked extraterritorial rights under the Fourth Amendment's "unreasonable searches" clause. <sup>396</sup>

The dissenters responded with municipal law arguments, although Justice Brennan's opinion sometimes went further. Himself a member of the *Reid v.*

387. 110 S. Ct. at 1066. Rehnquist did not really explain why the extraterritorial constitutional rights of American citizens might not also hinder these goals. In fact, Rehnquist was quoting from *Perez v. Brownell*, 356 U.S. 44, 57 (1958) (upholding involuntary denationalization in response to voting in foreign election as rational means of achieving foreign policy goals), *overruled*, *Afroyim v. Rusk*, 387 U.S. 253 (1967).

388. See *infra* text accompanying notes 432-39; cf. *Terrorism*, *supra* note 7 (advocating Hobbesian approach).

389. 110 S. Ct. at 1067 (Kennedy, J., concurring).

390. *Id.* at 1066 (Kennedy, J., concurring). It is hard to give this proposition a sensible meaning that is not false. It might mean merely that there is no *special* legal relationship between this country and everyone, which would be true but tautologous. General principles of law do give our government rights *against* this vast class of noncitizens, e.g., the right that they not enter its territory without its permission, as the Court has been fond of observing. If Kennedy meant that there is no juridical relation that *benefits* the aliens, then he is overlooking general principles of international human rights law, as well as the domestic constitutional doctrine that due process places certain limits on the authority of American courts to exercise personal jurisdiction over nonresident alien defendants. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

391. 110 S. Ct. at 1068.

392. *Id.*

393. *Id.* at 1068 (quoting *Reid v. Covert*, 354 U.S. at 75).

394. *Id.* at 1067.

395. *Id.* at 1068.

396. *Id.*

*Covert* plurality, Brennan placed his argument in that tradition. He characterized the municipal law argument as one of "mutuality":

Respondent is entitled to the protections of the Fourth Amendment because our Government, by investigating him and attempting to hold him accountable under United States criminal laws, has treated him as a member of our community for purposes of enforcing our laws. He has become, quite literally, one of the governed.<sup>397</sup>

Other portions of his opinion, however, suggested that security against unreasonable searches was a natural right incorporated by the Framers in the Constitution,<sup>398</sup> and that it might also restrict non-law-enforcement actions in pursuit of national security in peacetime.<sup>399</sup>

Justice Blackmun's brief dissent aligned itself with Brennan's municipal law argument, but disassociated itself from any suggestion of broader applicability to circumstances in which the government did not "purport to exercise sovereign authority over the foreign national."<sup>400</sup> Blackmun, moreover, would limit the content of extraterritorial Fourth Amendment protection, at least as regards noncitizens, to the "unreasonable searches" clause; he expressed agreement with the Government's argument that "an American magistrate's lack of power to authorize a search abroad renders the Warrant Clause inapplicable . . . ."<sup>401</sup> A conclusion of this kind remains possible under the municipal law approach as an interpretation of a particular clause.<sup>402</sup>

Thus, *Verdugo-Urquidez* reflects the same lack of consensus about the proper scope of American constitutionalism as did *Reid v. Covert* and the first *Insular Cases*: substantial blocs of Justices subscribe to opposing theories, and no single approach attracts a majority. An exploration of the history of these disputes has revealed the political and jurisprudential assumptions underlying these varying approaches, and demonstrates that the distance between Rehnquist's opinion and Kennedy's concurrence is wider than a superficial

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397. *Id.* at 1070-71 (Brennan, J., joined by Marshall, J., dissenting). He quoted the relevant passage from Madison's Report on the Alien and Sedition Acts. *Id.*

398. *Id.* at 1073.

399. *Id.* at 1075. This would seem, then, to be an argument of universalism, resting on either natural law or "organic act" bases, or both.

400. *Id.* at 1077-78 (Blackmun, J., dissenting) (emphasis in original).

401. *Id.* at 1078.

402. It could be argued, for example, that a warrant to search a residence is required only when its issuance can serve the three classical purposes of a warrant: to make the officer's intrusion into the residence privileged (as a defense against civil or criminal liability), to form the basis for an obligation of the homeowner not to interfere with the search (typically backed by a criminal sanction), and to safeguard constitutional privacy interests. *Cf.* Act of July 31, 1789, ch. 5, §§ 24, 27, 1 Stat. 43-44 (customs warrants); T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 41-44 (1969) (emphasizing affirmative character of warrants); 4 W. BLACKSTONE, *supra* note 74, at \*288 ("It is therefore in fact no warrant at all: for it will not justify the officer who acts under it . . ."). Interpreting the warrant clause this way would seem, however, to imply that citizens in foreign countries may also be unprotected, and that both aliens and citizens could still be protected on the high seas and in enclaves for which a true warrant can be issued.

reading might suggest. Demographics may indicate that, for the present, American law is facing a choice between the Kennedy-Frankfurter-Harlan global due process approach and Rehnquist's Hobbesian membership approach. I shall argue in the next Part, however, that the area of agreement between the Brennan and Blackmun dissents—a form of the municipal law approach—represents the best account of American constitutionalism.

## V. ASSERTING OBLIGATION

To resolve the question of the proper scope of the individual rights provisions of the United States Constitution, it is useful to ask what rights in a constitution are *for*, and in particular what United States constitutional rights are for. The general question may receive different answers in different constitutional traditions, and consequently the scope of rights under different constitutions may vary. I shall argue here that the municipal law approach best reflects the function of individual rights in American constitutionalism.

As an interpretive enterprise, this inquiry has interrelated normative and descriptive aspects. The scope of constitutional rights under a given constitution cannot be determined in isolation from the constitutional text and an awareness of the range of rights protected under that constitution.<sup>403</sup> An interpretive inquiry must also pay close attention to the constitutional tradition's own understanding of the function of constitutional rights, to the extent that this can be ascertained. Determinations regarding the scope of rights should preferably be coherent with other constitutional practices regarding the place of the constituted government in the world at large.

In the case of American constitutionalism, this Article has demonstrated conflicting conceptions of geographical scope that have led to serious indeterminacy in the modern period. Descriptive inquiries can go only so far; sparse case results can be reported, but in some respects the status quo cannot be described with sufficient certainty even to be critiqued. The question of scope must be resolved primarily by deliberative choice among alternative approaches on the basis of their normative characteristics and their coherence with less unsettled constitutional practices.

The United States Constitution has long been understood as a fundamental law within the meaning of the social contract tradition—a design for government and limitations on government that protect the interests of the governed sufficiently to form part of a justification of their obligation of obedience to

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403. The latter constraint is familiar from other contexts—for example, accounts of the function of the Fourteenth Amendment must grapple with the presence of such provisions as the Second and Seventh Amendments in the Bill of Rights, and accounts of Fifth Amendment due process must grapple with the absence of any express equal protection clause applicable to the federal government.

it.<sup>404</sup> Establishing a legitimate government empowers that government to generate obligations that would not exist in anarchy or a state of nature.

Under the Constitution, the legitimation of those obligations rests on several elements. First, the Constitution creates a republic, in particular a representative democracy in which the actions of the federal government are subject to the check of periodic elections. The Constitution sets up a framework within which the government is to be structured, distributing powers to institutions both for reasons of efficacy and to create the well-known checks and balances. Both the original Constitution and the subsequent amendments also contain guarantees of particular rights, limitations on the content of government activity and the modes of its exercise, without which the people were reluctant to confer authority upon the government. From the perspectives of 1790 and perhaps of 1890, some of the individual rights provisions of the Constitution represented direct protections of natural rights, while others were more indirectly justified; in 1990 there is less widespread agreement on the existence of "natural" or supra-positive rights.

Although American constitutionalism attributes part of the legitimacy of the government's authority to the consent derived from periodic elections, political rights have always been limited to an electorate narrower than the full class of persons within the nation's territory subject to that authority. Originally, the electorate was quite narrow; even today, children, felons, and aliens may be excluded. The nonpolitical, individual rights<sup>405</sup> have always been more widely distributed.

The rationale of the municipal law approach has been the presumption that American constitutional rights and the obligation of obedience to American law go together; particular provisions may be more narrowly interpreted because of textual or structural arguments but, in the absence of contrary indications, the rights and the obligations are coextensive. Law here includes not only legislation, but also judicial or executive acts that impose obligation. The constitutional rights of aliens present within the territory (whether resident or just passing through) correlate with their pervasive subjection to the law (the "local allegiance" of English common law).

The nineteenth-century idea that constitutional rights follow the flag, but go no further, reflected a conviction as to the incomplete nature of legal obligation outside the sovereign's territory. The United States generates obligations only in some of the contexts in which it acts; in other contexts the United States is merely one participant (though in recent years, a major participant) in an international order whose rules it cannot dictate. The notion that particular

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404. See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 106 (1978) (purpose of Constitution is to set out political scheme whose burdens on citizens can be justified as fair); G. WOOD, *supra* note 50, at 289-91, 600-02; see also J. RAWLS, *A THEORY OF JUSTICE* 353-55 (1971) (relating general obligation to obey legislation to adoption of just constitution).

405. The terminological distinction between political and civil rights has lost its currency.

states are endowed with particular territories over which they exercise sovereignty derives from that order, and was assumed as a background rule by the authors of the Constitution.

In fact, however, United States law has never been completely restricted to United States territory.<sup>406</sup> As the exercise of extraterritorial legislative power has become more frequent, the normative purpose of the municipal law approach requires broader application. The *Reid v. Covert* plurality recognized that need with regard to citizens abroad, who are subject to national legislative power absent exceptional circumstances.<sup>407</sup> Since that time, courts have struggled with the availability of constitutional rights to aliens abroad, whose subjection to United States law is the exception rather than the rule, depending on particular circumstances linking their conduct to the United States. Under the municipal law approach, when the United States asserts an alien's obligation to comply with American law, the alien is presumptively entitled *pro hac vice* to all constitutional rights.<sup>408</sup>

The value of the municipal law approach in enabling constitutional rights to serve their intended functions may be examined in a progression of contexts:

#### A. *The Insular Cases*

From the normative perspective of the naturalist tradition, the *Insular Cases* were grievously wrong. For the federal government to acquire total governing power over new territories—more complete, in fact, than in the states—without the consent of the local population and without according them (or according transplanted citizens) the rights reserved under the Constitution raises starkly the question of how the exercise of such governing power can be legitimated. The *Insular Cases* did meet the naturalist tradition part way by recognizing and making judicially enforceable certain “fundamental” guarantees, seemingly the minimum core of natural rights.<sup>409</sup> But, as the elder Harlan so patriotically protested, this constitutionalism was not *our* constitutionalism.<sup>410</sup> And when one recognizes that the ultimate justification for this reversal of constitutional practice was to facilitate emulation of European colonial powers and rule over

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406. See, e.g., Act of May 10, 1800, ch. 51, 2 Stat. 20 (forbidding participation by United States citizens and residents in slave trade from one foreign country to another).

407. See *Kawakita v. United States*, 343 U.S. 717, 735-36 (1952); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402, 403, 441 (1987).

408. Again, specific textual or other arguments may exceptionally demonstrate that a particular right is either reserved to citizens or geographically limited.

409. See *supra* text accompanying note 321.

410. See *supra* text accompanying notes 329-31. The *Insular Cases* cannot be theoretically defended by juxtaposing them with the then-current Fourteenth Amendment due process doctrine, because the populations of the states were protected against the federal government by the entire Bill of Rights and in theory had full power to design state constitutional protections against their own state governments. The *Insular Cases* did not provide, and were not designed to provide, a vehicle for constitutional self-determination by the subject peoples.

peoples “unfit” for American citizenship,<sup>411</sup> the lowering of normative standards seems all the more a betrayal.

It might be argued that, however wrong they were at the beginning of the century, the passage of time has woven the *Insular Cases* into the fabric of American constitutionalism. But, from a contemporary perspective, that claim also fails. No persuasive normative basis for the *Insular Cases* has been put forward, and the holding in *Reid v. Covert*,<sup>412</sup> not just Black’s opinion, severely undermined their foundation. It is hard to see the coherence of an approach that leads to the conclusion that American citizens cannot be tried by the federal government for capital offenses without jury trial in Japan, but can be so tried in Puerto Rico.<sup>413</sup>

#### B. *Territoriality and the Rights of Citizens Abroad*

The long survival of strict territoriality, on the other hand, had a severe logic of its own. The distinction between being inside and outside the borders of the United States is not a constitutional irrelevancy. The Constitution is an artifact of an era of territorial nation-states, and that era is not yet over. The Constitution obviously intends that the United States will have a territory, and that the federal government will place a high priority on maintaining its dominance vis-à-vis other nation-states in that territory. Text and legislative history confirm that the Fourteenth Amendment guarantees citizenship at birth only to persons born within United States territory, precisely because they are subject to the fullest measure of United States sovereignty.<sup>414</sup> The legal obligation of even citizens in foreign countries to comply with United States law, especially outside relatively tight-knit enclaves like ships and military bases, is extremely difficult to administer and enforce. The difficulties may be especially severe when the citizen is a dual national residing in her other country of nationality. Thus, the conceptual dodge that was used to justify strict territoriality—that municipal law was not binding of its own force, and so neither was the Constitution<sup>415</sup>—did not wholly lack a basis in reality.

Nonetheless, relying on this difference of degree to make constitutional rights unavailable to citizens on the high seas or in foreign countries creates serious anomalies that become increasingly visible as the exercise of government power abroad becomes more frequent. First, deciding whether government action against an individual has occurred inside or outside the United States involves familiar difficulties of situs. For example, if the State Department

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411. See *supra* text accompanying note 320.

412. 354 U.S. 1 (1957).

413. See *supra* text accompanying notes 322, 334, 359-64.

414. See *Weedin v. Chin Bow*, 274 U.S. 657 (1927); *United States v. Wong Kim Ark*, 169 U.S. 649 (1898); Neuman, *supra* note 176.

415. See *supra* text accompanying notes 282-84.

declares that an individual is no longer a United States citizen, that action could be viewed as taking place at the location where the decision was made, at the location where the individual was at the time, or at the location where the decision first had practical consequences for the individual (for example, she was refused permission to board a flight from Paris to New York). Second, to the extent that the government is constitutionally bound within but not beyond its borders, it possesses substantial power to manipulate constitutional limitations by choosing where and when to act against citizens who make the error of traveling or acquiring property abroad, or of submitting to military service.

Given that the drafting of the Bill of Rights reflected inattention to the problematics of government activity abroad rather than a conscious effort to design entitlements solely for application within the territory, the overthrow of strict territoriality represents an appropriate evolutionary response to changes in the technology of transportation and communication, background international practices, and American self-assertion. The question then arises which constitutional rights are extraterritorially applicable.<sup>416</sup>

Although the municipal law approach combines the greatest degree of historical fidelity and contemporary normative plausibility, even the antiquated strict territoriality rule would have greater legitimacy than the infinitely flexible approach of Frankfurter and the younger Harlan. If Justices wish to disincorporate the Bill of Rights vis-à-vis federal government action against citizens abroad, they need an alternative theory of constitutionalism to justify their interference with the political branches.<sup>417</sup> Frankfurter and Harlan's touchstone was a "due process" equating with "fundamental fairness" in light of practicality.<sup>418</sup> This approach to judicial review of federal action lacked even the modest textual grounding of their parallel approach to state action under the Fourteenth Amendment. Moreover, by jettisoning claims of a substituted normative foundation in natural law,<sup>419</sup> they further compounded the error of the *Insular Cases*. If Justices no longer believe in objective natural rights, then they have even less justification for adopting an approach that tends, in Black's apt words, to "destroy the benefit of a written Constitution and undermine the basis of our Government."<sup>420</sup>

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416. It bears repetition that the municipal law approach merely makes constitutional rights presumptively applicable; other inputs into interpretation of particular provisions may rebut the presumption. *See, e.g., supra* text accompanying notes 401-02 and note 402.

417. Here and later in this Part, I discuss approaches to constitutional scope as being judicially implemented. I do not mean thereby to place undue stress on questions of judicial enforcement. Rather this usage reflects the fact that the Supreme Court has usually discussed questions of constitutional scope on the merits, without hiding behind barriers of justiciability. The same problems would arise in a conscientious attempt by the legislature or the executive to comply with constitutional constraints.

418. *See supra* text accompanying notes 358-61, 365.

419. *Compare* text accompanying notes 358-66 *with* text accompanying notes 321-22.

420. *Reid v. Covert*, 354 U.S. 1, 14 (1957). Probably no more than a footnote is deserved by another suggestion, which has *not* been made, namely equating the "fundamental" and therefore binding constitutional rights of United States citizens abroad against the federal government with their rights under international human rights law. As a purely normative matter, this suggestion should lose its appeal once it is recognized



### C. *Aliens Abroad after the Fall of Territoriality*

Once the taboo against treating constitutional rights as effective beyond the nation's boundaries has been overcome, the question arises whether this development should be restricted to citizens. The legacy of the Alien Act debates includes the fundamental rejection of the claim that citizenship is the key to right-bearing capacity under the Constitution.<sup>421</sup> Moreover, not even the *Insular Cases* relied on a distinction between the rights of American citizens and the rights of subject peoples in the territories.<sup>422</sup> Are the rights of aliens wholly dependent on presence within the United States?

Rather than dwell on the intermediate category of resident aliens, I will proceed directly to the hardest case: aliens outside the United States who have never been inside the United States. The United States has increasingly asserted the right to subject such persons to American law when their actions outside the country have effects within the country or on American citizens. If we ask how a constitution could legitimate the exercise of such power over aliens abroad, the social contract tradition provides three relevant alternatives.<sup>423</sup>

First, the municipal law approach affords the express protections of fundamental law, to the extent their terms permit, as a condition for subjecting a person to the nation's law. Second, the minimum that a naturalist approach would tolerate would be extending to aliens abroad a supplementary fundamental law including only those protections directly required by natural law. Finally, a Hobbesian approach disdains the legitimation of the exercise of power outside the commonwealth, because "the Infliction of what evill soever, on an Innocent man, that is not a Subject, if it be for the benefit of the Commonwealth, and without violation of any former Covenant, is no breach of the Law of Nature."<sup>424</sup>

I shall first say more about the specification of the municipal law approach, and contrast it with universalism. Then I shall compare it with its other leading rivals: the Hobbesian denial that constitutionalism extends to aliens abroad, and the more minimal extraterritorial supplement to the Constitution currently represented by global due process.

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that international human rights standards have not been offered as a sufficient constitution for all societies, but rather as a uniform minimum standard of rights that can be agreed upon notwithstanding cultural diversity. A citizen of the United States may appropriately expect more from her government than the international minimum standard.

421. See *supra* text accompanying notes 159-88.

422. See *supra* text accompanying notes 313-15.

423. A fourth alternative, treating the people of each country in accordance with their own constitution, has little relevance today for a number of reasons, of which the most obvious may be that so many countries have democratic constitutions, and the United States would not be prepared to extend political rights to foreign populations in return for the right to apply its laws to them.

424. T. HOBBS, *supra* note 53, at 360. Of course, the third approach may be viewed as a special case of the second approach, with the additional Hobbesian assumption that natural law imposes no constraints in this context.

### 1. *Municipal Law and Universalism*

I initially described the municipal law approach as identifying a sphere in which a nation's municipal law operates, which was once defined in geographical terms but now is viewed more broadly. This description reifies the sphere of municipal law, and may obscure bases for disagreement over how that sphere should be identified. For example, the United States government sometimes acts in foreign countries in circumstances where it is claiming no authority over the foreign nationals with whom it interacts. The action may be consensual—the United States might offer financial assistance to a foreign political party whose ideology it favors, or contract for the purchase of supplies needed at an overseas office—or nonconsensual—an American intelligence agent may engage in surveillance that violates the privacy rights of a foreign national under local law, but the foreign national is under no obligation to cooperate.

The municipal law approach, as I have been arguing for it, defines the relevant sphere transactionally, extending constitutional rights to aliens abroad only in those situations in which the United States claims an individual's obedience to its commands on the basis of its legitimate authority.<sup>425</sup> To use Rehnquist's example,<sup>426</sup> the municipal law approach would not limit the seizure of French vessels during a state of limited war; nor would it restrict an ideologically-based policy of aid to foreign political parties.

A more expansive view of the municipal law approach might be offered by a universalist seeking support in social contract theory. The universalist would argue that the relevant sphere is now the planet Earth. There are federal statutes to which the United States demands universal obedience—foreign nationals abroad are legally forbidden to arrange for smuggling of drugs into the United States, to counterfeit the coinage of the United States, and so forth—and the universalist would conclude that all the world's population have become subjects of the American social contract. Accordingly, the United States would be required to recognize and respect their constitutional rights in all the contexts in which it interacts with them.

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425. This does not mean that forcible, lawless interactions between the government and the individual within the government's own territory are outside the scope of the municipal law approach. An argument of Lea Brilmayer's suggests that the United States would equally need a justification for dropping a bomb on Libya and for dropping a bomb on Philadelphia. *See* L. BRILMAYER, *JUSTIFYING INTERNATIONAL ACTS* 90-104 (1989). I do not disagree with this proposition as stated, but if the argument were to be transposed to the field of constitutionalism viewed in light of social contract theory in a world of territorial nation-states, then a major difference between the examples would result. The government claims an overriding right to control the use of force within its territory, to suppress rivals and to overcome resistance, or at least to dictate when resistance is permissible. Thus, even government lawlessness within the territory places its victim in a situation pervasively framed by the government's law and claims of obedience. The government claims no such overriding authority in foreign territory, and there can be occasions when its use of force there implicates no claims of sovereignty over the victims. Therefore the need for justification remains, but the criteria and forum for justification may differ in the two instances.

426. *See* *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1061-62 (1990).

The rejection of universalism, in this guise or any other, as a methodology for interpreting the Constitution rests on both historical and normative grounds. The universalist's interpretation would transcend the concerns of a single social contract and bind the government to the rules of a just world order, regulating the international use of armed force and injustices arising from the global distribution of wealth. A constitution could serve that function, but nothing in the text or history of the United States Constitution suggests that it offers itself as a solution to this broader problem.

The Constitution confers warmaking powers, but contains no specification of the permissible occasions for their use. As Madison wrote in *The Federalist*, defending Congress's authority to raise armies in time of peace, "If a federal Constitution could chain the ambition or set bounds to the exertions of all other nations, then indeed might it prudently chain the discretion of its own government, and set bounds to the exertions for its own safety."<sup>427</sup> Similarly, the Constitution restricts the ability of United States officials to accept gifts from foreign nations,<sup>428</sup> but does not correspondingly limit United States efforts to purchase influence abroad. The Constitution authorizes Congress to collect taxes to provide for the general welfare of the United States,<sup>429</sup> without expressly binding the government to humanitarian foreign aid policies. Although the United States has gained in strength and security since the eighteenth century, American constitutional tradition has persistently left open the substance of the United States' international relations, a fact reflected in the refusal to make international law as such constitutionally binding on Congress and the President.<sup>430</sup>

One may concede that a human being has moral rights against coercion or manipulation by other persons or groups that are not asserting sovereignty over her, and still decline to adopt a universalist approach to the interpretation of constitutional rights. The individual rights provisions of the Constitution do not purport to state moral duties that are owed by all persons and groups; rather, they state more exacting requirements that American citizens considered necessary constraints on the government's exercise of sovereignty. Some of these requirements may also be universal obligations, but the Constitution includes too full a list to be read as if they all were. It might make sense to design a two-track constitution that makes separately enforceable both the government's universal obligations and the broader set of obligations it incurs as sovereign. But the United States Constitution is not written that way. Universalism would overburden the government by attempting to enforce in the broader context constraints chosen for the narrower one.

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427. THE FEDERALIST NO. 41 (J. Madison) (defending Congress' authority to raise armies in time of peace).

428. U.S. CONST. art. I, § 9, c. 8.

429. *Id.* art. I, § 8, cl. 1.

430. See, e.g., Henkin, *The President and International Law*, 80 AM. J. INT'L L. 930 (1986).

Conversely, universalism could also pose dangers to constitutional rights at home. As has been recognized in other contexts, constitutional protections may suffer dilution when they are extended into areas previously thought outside their coverage. Arguments for limiting the rights in their new application have a way of filtering back to undermine the original core.<sup>431</sup>

Thus, constitutional rights should not be interpreted as restricting all government action against all persons in all places, even when the government does not assert its sovereignty over the individual. This does not mean that such uses of force or wealth are immune from demands for justification, but simply that the standards of justification are not to be sought in the United States Constitution.

## 2. *Against Hobbesism*

A Hobbesian would take Madison's caution against rigid constitutional restrictions on the raising of armies<sup>432</sup> much further, and deny constitutional rights in all circumstances to aliens abroad. This Hobbesian strain is easily identified in Chief Justice Rehnquist's *Verdugo-Urquidez* opinion: no minimum of personal or domestic privacy remains enforceable through the core of the Fourth Amendment, and the alien's rightlessness results from his nonmembership in the community. In characterizing this position as Hobbesian, I am not placing exaggerated emphasis either on the location of rights in a constitution or on judicial review. Rehnquist did not argue that the contours of Fourth Amendment rights abroad were merely nonjusticiable, or that aliens' privacy rights were adequately protected by nonconstitutional law. He specifically encouraged the executive and legislative branches to feel that they were not constitutionally constrained in searching aliens' property abroad, and that there were no limits on their power unless they chose to create some.<sup>433</sup>

The standard defense of a Hobbesian approach to extraterritorial action rests on national insecurity. The Commonwealth is in a state of nature, i.e. War, with the rest of the world, and its only external obligations are those resulting from explicit promises; the Hobbesian fears being unilaterally disarmed.<sup>434</sup> But Hobbes understood well the consequences of this theory for legal obligation: a Commonwealth may exercise force against outsiders, but persons within the territory of Commonwealth *B* generally have no *obligation* to obey the laws of Commonwealth *A*.<sup>435</sup> Thus the Hobbesian argument would enable the gov-

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431. See, e.g., *Williams v. Florida*, 399 U.S. 78, 118 (1970) (Harlan, J., concurring in part and dissenting in part); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 701 (2d ed. 1988).

432. See *supra* text accompanying note 427.

433. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1065-66 (1990).

434. See T. HOBBS, *supra* note 53, at 360; *Terrorism*, *supra* note 7, at 850-51; see also T. POGGE, *REALIZING RAWLS* 220-27 (1989) (giving critical description of modern world order in Hobbesian terms).

435. See T. HOBBS, *supra* note 53, at 272-73, 345.

ernment to withhold constitutional rights, but only at the price of delegitimizing its claim to obedience.

The Hobbesian also faces another obstacle. He must explain how one could justify grafting a Hobbesian approach to the rights of aliens abroad onto an otherwise anti-Hobbesian constitutional tradition.

The Hobbesian might argue that interactions between a government and aliens outside its territory, unlike interactions between the government and its citizens or aliens within its territory, lie outside the sphere of social contract analysis because of the absence of consent. Claims about the actual or tacit consent of citizens and of aliens within the territory to government authority may be predicated on retention of citizenship or entering or failing to leave the territory, but, when a nation extends its laws to aliens abroad, there is no action by which these aliens can withdraw themselves from the class of the "governed," and conversely no act that can be interpreted as expressing actual or tacit consent.

Given the impossibility of finding consent, the Hobbesian would assert that contractarian arguments could not justify legislative power over aliens abroad, and that the Constitution should not be extended in an attempt at justification doomed to failure. Many would respond, however, that this argument rests on a distinction without a difference; authors since Hume have emphasized the strained character of claims of the actual or tacit consent, as opposed to hypothetical consent, even of later generations of citizens.<sup>436</sup>

The Hobbesian cannot shrug off these criticisms by asserting that, regardless of what more careful thinkers have concluded, American constitutional tradition has incorporated this flawed dependence on actual or tacit consent. Such an assertion would be belied by juxtaposing the Hobbesian approach to rights of nonresident aliens abroad with the treatment of the same individuals as criminal defendants or civil litigants in the courts of the United States. If we take seriously the Hobbesian claim that these aliens have no constitutional rights abroad at all, then it would seem to follow that there are no constitutional limits on the content of the laws to which they may be subjected,<sup>437</sup> at least so long as the imposition of sanctions does not take place within the United States.<sup>438</sup> For example, the United States could make it a crime for a foreign national abroad to publish a defense of the moral propriety of international terrorism, to terminate her pregnancy by an American male without his consent, to refuse

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436. See D. HUME, *Of the Original Contract*, in *ESSAYS: MORAL, POLITICAL AND LITERARY* 475 (E. Miller ed. 1985); see, e.g., D. GAUTHIER, *MORAL DEALING: CONTRACT, ETHICS AND REASON* 53-57 (1990); J. HAMPTON, *HOBBS AND THE SOCIAL CONTRACT TRADITION* 266-79 (1986); J. RAWLS, *supra* note 404, at 12.

437. As opposed to limits derived from international law, with which Congress is under no constitutional compulsion to comply.

438. Surely the passage of legislation within the United States is not sufficient to trigger constitutional protection unavailable outside its borders; it does not make sense to say that decisions made by executive officials overseas are not constrained by constitutional rights, while enactment of legislation by Congress, including legislation defining the powers of those officials, is so constrained.

the CIA permission to install listening devices in her home, or to preach "fundamentalist" Islam. Congress could set up tribunals on military bases or naval vessels, where the procedure at trial would be free of constitutional constraints. Executing the sentence abroad might provide the greatest flexibility, but so long as the punishment were not cruel and unusual, it might even be possible to execute it in the United States.<sup>439</sup>

In contrast, American courts have not treated foreign defendants brought involuntarily into United States territory for trial virtually as enemies to be dealt with at will. Courts have generally assumed that their authority over such defendants must be exercised within the bounds of constitutional constraint, including the constitutional rights that govern trial procedure, and that the substance of the criminal statutes said to have been violated abroad is subject to judicial review.<sup>440</sup>

Why should the nonresident alien defendant become protected by the Bill of Rights when brought into the United States for trial? As Chief Justice Rehnquist accurately observed in *Verdugo-Urquidez*, the fact of being extradited or kidnapped into the United States does not itself signify the alien's undertaking of any voluntary, consensual relation with the United States. Conceivably the more effective subjection of the defendant to obligations of compliance with United States law after arrival in the United States favors extension of constitutional rights to the defendant. But civil defendants, whose presence in the United States is not required for the litigation to proceed at all,<sup>441</sup> are also entitled to constitutional protections at trial. And in the civil context, the Supreme Court has held that the very absence of minimum contacts between an alien defendant and the jurisdiction creates a due process right to have the court dismiss the lawsuit.<sup>442</sup>

Thus, the character of the defendant as a nonresident alien, or even as an alien who has *never* entered the United States, does not determine the applicability of a wide range of constitutional provisions when the courts of the United States are proceeding to judgment. Before *Reid v. Covert*, this phenomenon could be rationalized by treating the situs of the litigation as determinative under a theory of the territoriality of constitutional obligation, but that argument can no longer be sincerely employed.

Instead, as I have argued, observance of constitutional limitations in a trial in federal district court against a nonresident alien defendant rests on the role

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439. This was true, for example, under the consular court system upheld in *In re Ross*, 140 U.S. 453 (1891). See *supra* text accompanying notes 279-81.

440. See *supra* note 376 and accompanying text.

441. The difference between criminal and civil defendants depends on the United States' attitude toward criminal trials in absentia. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 422(2) comment c(iii) & reporters' note 6 (1987); *id.* § 475 comment h; cf. 4 W. BLACKSTONE, *supra* note 74, at \*313.

442. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).

that the system of constitutional rights plays in legitimating the United States' assertion of legal obligation against the alien. That same consideration would also require its application in an extraterritorial tribunal of the United States.

### 3. Against "Global Due Process"

Unlike the Hobbesian approach, which subjects aliens to sovereign command without corresponding rights against the sovereign, the global due process approach originated by Frankfurter and Harlan, and further applied by Justice Kennedy, envisions some judicially enforceable constitutional limitations on government action abroad. Not only is it, generally speaking, a form of constitutionalism, but it also has an obvious pedigree in the *Insular Cases*, which imposed on the unincorporated territories a fundamental law including minimal protections of natural rights.

Nonetheless, global due process as currently practiced is merely analogous to, rather than equal to, an approach based on a core of natural rights or international human rights. The global due process approach embodies judicial discretion to reject, after deferential inquiry, the applicability of constitutional rights to government action abroad in situations where they would appear "impracticable and anomalous."<sup>443</sup> The precise content of this standard cannot presently be specified, but its laxity may best be illustrated by Frankfurter and Harlan's conclusion that military trials are permissible for noncapital cases involving civilians abroad,<sup>444</sup> and by their view that it justifies the departures from constitutional practice approved in the *Insular Cases*.<sup>445</sup>

The argument against global due process as regards aliens is largely an overlay of two arguments already made: the argument against Hobbesian rightlessness, and the criticisms of the Frankfurter-Harlan positivization of the *Insular Cases* approach in their concurrences in *Reid v. Covert*. Admittedly, if global due process is all that is required for citizens abroad, neither the text of the Constitution nor the tradition of its interpretation provides support for a claim that aliens abroad are entitled to *more*.<sup>446</sup>

If broad considerations of practicality do not suffice to oust the written Constitution for American citizens (including dual nationals) residing abroad, then why should they have that effect for aliens? An additional relevant factor is that international law, albeit not constitutionally binding on Congress, places somewhat stricter limits on the circumstances in which the United States may

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443. *Verdugo-Urquidez*, 110 S. Ct. at 1067 (Kennedy, J., concurring) (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)).

444. *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 249 (1960) (Harlan, J., dissenting).

445. *Reid v. Covert*, 354 U.S. 1, 74 (Harlan, J., concurring).

446. I do not mean to reject the plausibility of a normative argument, independent of American constitutional history, that more protections may be required to justify the exercise of authority over individuals who do not have the right to vote in United States elections, are not the primary intended beneficiaries of United States law, and have no avenue for removing themselves from the class of the "governed."

apply its laws extraterritorially to aliens residing in foreign territory than to American citizens residing abroad. Although these limits do not eliminate the need for legitimating United States authority over aliens abroad, it might be argued that this lesser authority can be legitimated with a lesser set of rights.<sup>447</sup>

Yet these factors have not prompted courts to depart from the Constitution once an alien defendant is brought into the United States for trial. Compliance with constitutional rights as written, despite the locus of the offense charged, does complicate the task of making American law enforceable against persons outside the nation's borders. For example, requiring the government to prove the commission of a crime abroad beyond a reasonable doubt creates substantial difficulties for the prosecution in light of the government's reduced capacity for collecting evidence abroad, and moving the trial to the United States may increase rather than decrease the difficulty of proof. Allowing the defendant to refuse to testify against herself eliminates one of the best sources of evidence likely to be found in the United States, and often gives the defendant a right she would not have had under her own legal system. Nonetheless, alien defendants extradited or kidnapped into the United States have no more been relegated to a flexible due process approach to their rights at trial than to a state of Hobbesian rightlessness. Within the United States, via unthinking application of the old territoriality rule, the written Constitution governs at trial.

If alien defendants have constitutional rights, then those rights should not be subject to diminution by the government's manipulation of situs. The narrow holding in *Verdugo-Urquidez* would not create incentives for manipulative behavior because it involved a search of immoveable property, whose situs is fixed. But a global due process approach could create incentives for the government to interrogate arrested aliens or search their persons before bringing them to the United States, or possibly even to try them outside the United States in order to avoid triggering constitutional limitations that would otherwise apply. Concerns about manipulation, however, may be less compelling in the case of nonresident aliens, who might be considered as "normally" located abroad, than in the case of citizens,<sup>448</sup> whose "normal" presence inside the United States might indicate a different baseline.

More fundamentally, it is not clear how any branch of government, and in particular, a positivist Supreme Court, can make the trade-offs necessary for

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447. The dissenting circuit judge in *Verdugo-Urquidez* alluded to some version of this argument, asserting that "by providing Verdugo with fifth and sixth amendment protections during the charging and trial phases of the criminal process, our government has given him ample consideration to justify subjecting him to our drug laws." *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1237 (9th Cir. 1988) (Wallace, J., dissenting). Taking this quotation at face value, however, it appears not to phrase the question properly. Under a social contract approach, rights are not measured out differentially in compensation for particular government actions. Rather, they are part of a system of powers and limitations on power that can justly claim the individual's obedience. The prosecutor cannot determine how many rights the defendant gets by deciding how many extraterritorial crimes to charge.

448. See text accompanying *supra* note 416.



designing a separate extraterritorial constitution for aliens. Frankfurter's confidence that he could carry out a due process project for citizens in the international context obviously mirrored his similar attitude in the Fourteenth Amendment context, where his inability to communicate any objective basis for his confidence ultimately contributed to the increasingly successful incorporation of the Bill of Rights into the due process clause.

Before leaving the subject of global due process, a defense of the municipal law approach should address the normatively sounder model from which global due process derives: the model that extends a minimal constitutional protection of natural rights to aliens abroad. In comparison with this latter model, the global due process approach is asking the wrong question: the Court should not be inquiring as to which constraints present problems of practicability, but rather as to which rights a government must respect in order to justify its claim to obedience.

Admittedly, no modern Justice has argued for this approach, a fact attributable in part to positivistic jurisprudential assumptions.<sup>449</sup> The difficulty of its judicial implementation would also be daunting. One possibility might be to adopt as aliens' extraterritorial constitutional rights the minimum standards of international human rights law.<sup>450</sup> Those standards, however, develop over time, and direct incorporation of international law would stand in tension with the United States' longstanding version of a dualist tradition: unlike the constitutions of certain other nations,<sup>451</sup> the United States Constitution does not bind the national legislature to comply with its obligations under international law.<sup>452</sup> Moreover, Supreme Court majorities have denied the constitutional status of certain economic and social human rights, even for citizens.<sup>453</sup>

The other alternative is for the Court itself to determine aliens' natural rights and the minimum government machinery necessary to protect them. This task may be more complicated than simply weeding through the Bill of Rights.

449. Justice Stevens, who concurred opaquely in the result in *Verdugo-Urquidez*, might someday adopt such an approach; on prior occasions he has made unusually clear statements of belief in supra-positive rights. See, e.g., *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841, 2885 (1990) (Stevens, J., dissenting); *Meachum v. Fano*, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting).

450. I mean this description literally: to adopt international human rights norms as constitutionally binding, beyond the power of any branch of government to infringe. This mode of implementation differs greatly from other, subconstitutional modes, such as adopting international human rights norms as statutory law binding on the executive, or painstaking voluntary compliance with those norms as international law by Congress. I take no position in this Article on subconstitutional modes of implementation of international human rights.

451. See, e.g., GG art. 25 (German Constitution); J. SWEENEY, C. OLIVER & N. LEECH, *CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM* 13-14, 21-23 (2d ed. 1981).

452. See, e.g., *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* § 115 (1987). But see Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071 (1985).

453. See, e.g., *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998 (1989) (emphasizing negative character of constitutional rights); *Lindsey v. Normet*, 405 U.S. 56 (1972) (no constitutional right to housing); *Dandridge v. Williams*, 397 U.S. 471 (1970) (no constitutional right to welfare benefits).

Eliminating an individual right also increases the reach of the authority that the remaining rights must justify, and by definition the aliens enjoy no compensating political rights.

The product would be an unwritten Constitution with a vengeance. It is hard to see why the Justices should think that this task has been assigned to them, or that they could perform it well. American courts have been most successful in enforcing American constitutional values, not in searching for least common denominators.

### CONCLUSION

The history of debates over the scope of American constitutionalism illuminates the Supreme Court's continuing inability to settle upon a single perspective toward the persons, places and circumstances to which constitutional rights apply. Over time, varying current policy imperatives prompt political actors to seek to free themselves from constitutional restrictions by attributing "otherness" to the targets of their actions. When such disputes are thoughtfully handled, they test understandings of the function of individual rights under the Constitution.

The Supreme Court's latest, inconclusive confrontation with this problem in *Verdugo-Urquidez* illustrates the need for a dynamic understanding of the problem of constitutional scope. Formalistic manipulation of two centuries' worth of inconsistent rules leaves individual rights vulnerable to political pressures. Although one might perceive the trend since 1789 as an expansion of constitutional protection in absolute terms, it should be remembered that the *Insular Cases* produced a contraction in the scope of constitutional protection relative to the nation's borders. This could happen again, as indicated by Chief Justice Rehnquist's sudden discovery—fortunately tentative, in dictum, and not speaking for a majority of the Court—that newly arrived aliens may not be included among the "people."<sup>454</sup>

Rehnquist's opinion also demonstrates the need for a limiting principle, so that judicial review will not find its *reductio ad absurdum* in due process of war.<sup>455</sup> For most of American history, the municipal law approach has provided that principle, facilitating the liberal recognition of constitutional rights, irrespective of their natural law status, in association with positivism, conventionalism or traditionalism. By requiring the government to afford constitutional rights whenever it asserts legal obligation against any human being, the municipal law approach respects the function that fundamental law serves in the social contract tradition. Its sense of jurisdictional limits has proven capable of evolution, and has lessened the temptation to retreat to forms of

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454. *Verdugo-Urquidez*, 110 S. Ct. at 1064-65.

455. See *id.* at 1065 (citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950)); *id.* at 1074 (Brennan, J., dissenting) (same).

constitutionalism “for members only” that were wrong in 1798 and are wrong today.

